CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 817

THE ROYAL INDEMNITY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1941.

CERTIORARI GRANTED APRIL 7, 1941.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1941.
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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

ROYAL INDEMNITY COMPANY, Defendant-Appellant

STATEMENT UNDER RULE 13

This action was commenced by the issuance of a summons on April 27, 1935.

There has been no change of parties or attorneys since the action was commenced, except that Martin Conboy has been succeeded by Lamar Hardy, who has been succeeded by John T. Cahill, attorneys for plaintiff.

The complaint was filed on May 6, 1935.

Defendant's time to answer was extended and answer was filed on June 27, 1935. The facts were agreed to and stipulation of facts duly filed.

Based on the agreed facts plaintiff filed note of issue, notice and motion for summary judgment in its favor on January 24, 1940.

Defendant filed note of issue and counter motion for summary judgment in its favor on January 29, 1940. Plaintiff's motion and defendant's counter motion were heard together before Judge Bondy January 30, 1940. Decision was reserved, and on April 16, 1940 the Court filed its [fol. 2] opinion sustaining motion of plaintiff for summary judgment for $4,169.07 and denied the motion of defendant for a summary judgment in its favor and to dismiss the cause of action.

On April 27, 1940 the Court entered Order and Judgment in favor of plaintiff for $4,169.07 and costs of $22.17.

Defendant filed its notice of appeal on the 1st day of July, 1940.

Plaintiff filed cross-notice of appeal July 2, 1940.

IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, Plaintiff,

against

ROYAL INDEMNITY COMPANY, Defendant

COMPLAINT

The plaintiff, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, complains of the defendant herein and on information and belief alleges:

1. The plaintiff is a sovereign body politic.

[fol. 3] 2. The defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, doing business within the Southern District of New York, with an office and principal place of business at 84 William Street, City and County of New York, in the State and Southern District of New York, within the jurisdiction of this Court.

3. This is a suit of a civil nature, founded on contract, arising out of the laws of the United States providing for internal revenue and authorized and sanctioned by the Commissioner of Internal Revenue and the Attorney General of the United States.

4. On or about March 15, 1920, the Commissioner of Internal Revenue assessed against one Walter Moore an additional assessment of income tax for the calendar year 1917 in the amount of $29,128.82.

5. The said additional assessment of income tax for the year 1917 was reported to William H. Edwards, the then Collector of Internal Revenue for the Second Collection District of New York, on the March, 1920 Special No. 47 List, page 45, line 4.

6. Thereafter, on or about May 6, 1920, the said William H. Edwards, being charged with the collection of the additional assessment as aforesaid, served notice and demand on the said Walter Moore for its payment in accordance

with the law then applicable and regulations promulgated thereunder, but no part of the said additional assessment was paid.

7. Thereafter, the said Walter Moore protested the payment of the said additional assessment and in considera- [fol. 4] tion of the said Collector of Internal Revenue refraining from and suspending the collection of the said additional assessment and interest for twelve months pending the consideration and review by the Commissioner of Internal Revenue of an abatement claim filed by the said Walter Moore on or about May 13, 1920, for the abatement of the entire amount of the said additional assessment, said Walter Moore, as principal and the defendant, Royal Indemnity Company, by its Vice-President and Assistant Secretary as surety, executed and delivered to the said William H. Edwards, Collector of Internal Revenue, their bond, signed with their respective names and sealed with the corporate seal of the defendant, whereby the said Walter Moore and the defendant bound themselves, their successors and assigns, jointly and severally, unto William H. Edwards, Collector of Internal Revenue, Second District of New York, and his successors in office, in the sum of $31,000, lawful money of the United States of America, payment well and truly to be made to the Collector of Internal Revenue for the Second District of New York.

8. The said bond was executed and delivered by the defendant to the said William H. Edwards, Collector of Internal Revenue, to secure the payment of taxes due and owing the United States by the said Walter Moore; and the said William H. Edwards is not now Collector of Internal Revenue and the plaintiff, the United States of America, is the real party in interest and entitled to the proceeds of any recovery herein.

A photostat of the said bond is annexed hereto and made a part hereof as if fully rewritten herein and is marked Exhibit A.

9. The said bond contains a condition in substance as follows: whereas the said Walter Moore has been assessed a [fol. 5] tax by the Internal Revenue Department of the United States in the sum of $29,128.82, and whereas he has requested the Collector of Internal Revenue for the Second District of New York to refrain from and suspend the collection thereof and such interest as may accumulate thereon

for 12 months in order that the taxpayer may have an opportunity to pay so much thereof as remains unpaid with interest thereon, now, therefore, the condition of the bond is such that if the said Walter Moore shall pay the balance and the accrued penalties with the interest aforesaid to the Collector at the expiration of the extended period, then the obligation shall be void, otherwise to be in full force and virtue.

10. On or about May 2, 1922, the said Walter Moore and the defendant, executed and delivered unto the Collector of Internal Revenue for the Second Collection District of New York, a second bond in the penal sum of $38,000, containing substantially the same provisions and conditions contained in the first bond hereinabove set forth with the exception of the amount of the penal sum thereof, which said bond is not now in the possession of the plaintiff or any of its officers or employees but is believed to be in the possession of the defendant; and the plaintiff respectfully requests the defendant to produce the said bond or a copy thereof.

11. Upon the filing of the said bonds the said Collector suspended the collection of the said additional assessment and interest while the Commissioner of Internal Revenue duly considered the said claim for abatement, and on March 23, 1925, the said Commissioner of Internal Revenue allowed the claim for the sum of $20,906.15 abating that amount on schedule No. 13412 and rejected the same in the amount of $8,223.67 thereby determining said amount to be due and properly assessed.

[fol. 6] 12. The said Walter Moore was notified of the decision of the Commissioner of Internal Revenue with respect to the rejection of a part of his abatement claim and upon his failure to pay, the then Collector of Internal Revenue made demand upon the defendant for the payment of the amount for which the abatement claim was rejected as aforesaid, with interest.

13. On or about December 18, 1926, the defendant paid to Frank K. Bowers, the then Collector of Internal Revenue for the Second Collection District of New York, the principal amount of the assessment for which the abatement claim was rejected of $8,223.67, but wholly failed, neglected and refused to pay interest then due and owing the United

States of America, in the sum of $4,932.86, computed as follows:

Unabated portion of the tax	$8,223.67
Interest from May 6, 1920 (the date of the original demand) to November 22, 1921 on $8,223.67 at 12%	1,527.58
Interest from November 22, 1921 to February 18, 1925 on $8,223.67 at 6%	1,599.22
Interest from February 18, 1925 to December 18, 1926 (date of payment) at 12% per annum	1,806.06
Total due	$13,156.53
Amount paid	8,223.67
Balance due	$4,932.86

14. On or about September 20, 1932, William Duggan, at that time the Collector of Internal Revenue for the Second Collection District of New York, made demand on the said [fol. 7] Walter Moore by registered letter addressed to his last known address for the sum of $4,932.86, plus statutory interest to date of payment, but such demand was returned "not found," and thereafter, on or about September 23, 1932, the said Collector of Internal Revenue made demand on the defendant that it pay the amount of said interest of $4,932.86, with interest to date of payment, which sum remained due and unpaid as aforesaid, but said defendant wholly failed, neglected and refused to pay and does yet wholly fail, neglect and refuse to pay said amount or any part thereof, in breach of the conditions of the said bonds which had then become and now are absolute.

15. Pursuant to the statute in such cases made and provided, interest accrued and has accrued on said amount of $4,932.86 at the rate of one per centum per month from December 18, 1926, until payment is made in full.

16. By reason of the foregoing, there is justly due the plaintiff from the defendant on account of said outstanding and unpaid interest, the sum of $4,932.86, with interest thereon at one per centum per month from December 18, 1926, until paid.

Wherefore, plaintiff prays judgment against the defendant in the sum of $4,932.86 with interest thereon at one

per centum per month from December 18, 1926, to date of payment, and the costs and disbursements of this action.

Martin Conboy, United States Attorney, Attorney for Plaintiff.

(Verified by Elizabeth Rogers Horan, as Asst. United States Attorney on April 27, 1935.)

[fol. 8] EXHIBIT "A", ATTACHED TO FOREGOING COMPLAINT

Exhibit "A" referred to in the complaint is the bond executed on the 1st day of December, 1920 for $31,000.00, and is not here copied, but a photostatic copy thereof is annexed to the stipulation of facts as Exhibit "A", to which reference is here made.

The second bond for $38,000.00 and referred to in paragraph 10 of the complaint is made a part of this record as Exhibit "B" to stipulation of facts to which reference is here made.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ANSWER

The defendant Royal Indemnity Company, by its attorney, Harry S. Hall, answering the complaint herein states:

First. The defendant in answering paragraphs 1, 2, 3, 7, 8, 9, 11 and 12 admits the allegations therein contained as being probably true.

Second. The defendant in answering paragraphs 4, 5, 6, 10, 13 and 14 neither admits nor denies the allegations therein contained, but of them demands strict proof.

[fol. 9] Third. The defendant in answering paragraphs 15 and 16 denies the allegations therein contained and says that it is not indebted to the plaintiff for interest or other amount therein alleged and that it is not liable for an accumulation of interest on the interest claimed from December 18, 1926 as a matter of fact or law.

Fourth. In further answering the complaint and more especially the allegations contained in paragraph 13, the defendant denies that it is liable for interest at the rate

of 12% per annum or 1% a month as therein alleged as a matter of fact or law.

Fifth. The defendant in further answering the allegations in paragraph 10 of the complaint denies that it is liable to the plaintiff for the amount sued for or alleged in the complaint or any other amounts; that the defendant has fully paid and satisfied the plaintiff for the amounts sued on in full, and that the bond sued on which the plaintiff says is in the possession of the defendant, was returned to the defendant and cancelled on the payment by the defendant to the plaintiff of the obligation of said bond.

Sixth. In further answering the allegations contained in the complaint, the defendant Royal Indemnity Company comes now and pleads accord and satisfaction of the amount of the claim sued on.

Seventh. Further answering the complaint the defendant says that no amounts are alleged in the complaint for which the plaintiff is entitled to recover.

All allegations herein not specifically admitted or denied are now generally denied.

[fol. 10] Wherefore, defendant demands a judgment dismissing the complaint with costs.

Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City.

In United States Distric Court, Southern District of New York

Stipulation of Facts

It is Hereby Stipulated and Agreed by and between the attorneys for the parties hereto that the following are the facts of this action. This stipulation is without waiver of any objections of relevancy or materiality and without prejudice to the submission of further evidence not inconsistent with the facts herein set forth.

1. On or about March 15, 1920, the Commissioner of Internal Revenue assessed against one Walter Moore of the City, County and State of New York, a deficiency of income [fol. 11] tax for the calendar year 1917 in the amount of $29,128.82.

2. The said additional assessment of income tax was duly reported to William H. Edwards, the then Collector of Internal Revenue for the Second District of New York, on the Commissioner's March, 1920 Special No. 47, list, page 45, line 4. On the 6th day of May, 1920, the said Collector of Internal Revenue served notice and demand on the said Walter Moore for payment of the aforesaid additional income tax.

3. The taxpayer, Walter Moore, on receipt of the notice and demand for payment of the tax from the Collector, prepared and filed with the Commissioner of Internal Revenue at Washington a protest and claim in abatement.

4. On December 1, 1920, the taxpayer, Walter Moore, and the defendant Royal Indemnity Company, as surety, executed a bond No. SX-59300 to William H. Edwards, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of $31,000 in consideration of suspension of collection on the part of the Collector and to secure the payment of any tax found by the Commissioner of Internal Revenue to be due on consideration of the claim in abatement. A photostatic copy of the said bond dated December 1, 1920, is annexed hereto as Exhibit A.

5. On the 2nd day of May, 1922, the taxpayer, Walter Moore, and the defendant, Royal Indemnity Company, as surety, executed at the request of the Collector a second bond No. SX-81670 in the sum of $38,000 for the same purpose. The said bond No. SX-81670 superseded, was ac-
[fol. 12] cepted in lieu of and substituted for the first bond No. SX-59300. A photostatic copy of said bond No. SX-81670 is annexed hereto as Exhibit B. The execution of the second bond was considered by the Royal Indemnity Company as a release of the first bond, and no premium was thereafter demanded by it on the first bond.

6. Upon the filing of the said bonds the Collector continued to suspend the collection of the said additional assessment and interest while the Commissioner of Internal Revenue considered the said claim for abatement, and on February 18, 1925, the Commissioner of Internal Revenue allowed the claim in abatement for the sum of $20,906.15, and rejected the same in the amount of $8,223.67, thereby determining said amount to be due and properly assessed.

7. Said Walter Moore was notified of the decision of the Commissioner of Internal Revenue with respect to the rejection of a part of his abatement claim, and upon his failure to pay, the then Collector of Internal Revenue wrote the following letter to the defendant:

"August 5, 1926.

Royal Indemnity Co.,
84 William Street,
New York, N. Y.

Re: Bond of Walter Moore SX 81670 $38,000.00

Demand is hereby made upon you for payment of $14,-555.89 on bond executed by you in the amount of $38,000, May 2, 1922 in behalf of Walter Moore whose address then was 27 Beaver Street, New York.

[fol. 13] Collection of this tax, which is due and payable from the principal, has failed.

Very truly yours, Frank K. Bowers, Collector."

8. Between August 5, 1926 and December 17, 1926, correspondence took place between the defendant and the Collector of Internal Revenue, in which the defendant disputed liability in the sum of $14,555.89.

9. A draft No. B-7877 dated December 17, 1926 in the sum of $8,223.67 was thereafter submitted to the Collector, which draft was accepted by him and paid upon presentation. A copy of the said draft dated December 17, 1926 is annexed hereto as Exhibit C.

10. On December 20, 1926 the Collector returned the bond SX-81670 dated May 2, 1922 in the sum of $38,000 to the defendant, with the following letter:

"New York, December 20, 1926.

Royal Indemnity Co., 84 William Street, New York, N. Y.

GENTLEMEN:

This transmits bond SX 81670—Walter Moore, dated May 2nd, 1922, executed by you in the amount of $38,000.

[fol. 14] All liability under this bond is hereby terminated.

Very truly yours, Frank K. Bowers, Collector."

11. The Royal Indemnity Company on receipt of said letter from the Collector and the bond transmitted therewith closed this case in its files.

12. Thereafter and on or about September 20, 1932 the then Collector of Internal Revenue for the Second District of New York made demand upon Walter Moore upon his bond for payment of $4,119.98 representing interest outstanding on additional income tax for the year 1917. The said demand was returned "not found", and thereafter and on or about September 23, 1932 the said Collector made demand upon the Royal Indemnity Company for payment of the said $4,119.98.

13. The defendant, Royal Indemnity Company, refused to pay the said sum of $4,119.98 or any other amount, and no amount has been paid in discharge of the liability of Walter Moore and the defendant upon the bond SX-81670 dated May 2, 1922 except the amount of $8,223.67 as aforesaid.

Dated, New York, N. Y., January 23, 1940.

John T. Cahill, United States Attorney, Attorney for Plaintiff; Harry S. Hall, Attorney for Defendant.

(Here follow 3 photolithographs, side folios 15, 16, 17-18)

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Exhibit "A" attached to Stipulation of Facts.

Suit No. 1

KNOW ALL MEN BY THESE PRESENTS, That we, WALTER MOORE, New York City, New York, as principal, and the ROYAL INDEMNITY COMPANY, 150 having an office and principal place of business at 84 William Street, Borough of Manhattan, City and County of New York, as surety, are held and firmly bound unto William H. Edwards, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of $58,000.00 Dollars, lawful money of the United States of America, to be paid to the said Collector, to which payment, well and truly to be made said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 1st day of December, 1920.

WHEREAS, WALTER MOORE the above mentioned principal, has been assessed by the Internal Revenue Department of the United States in the sum of twenty-nine thousand one hundred twenty-eight & 82/100 Dollars, under the Revenue Act of and (List of ; page ; line ,).

Whereas, WALTER MOORE has requested that WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York, whose duty it is to collect said assessment, to refrain from and suspend the collection thereof and such interest as may accumulate thereon for a period 18 months from date hereof, in order that it may have an opportunity to pay so much thereof as remains unpaid with the interest thereon until paid as required by law, which at the present time amounts to twenty-nine thousand one hundred twenty-eight and 82/100 (29,128.82) Dollars.

Stamp chart
Rate per $100 or fraction
Amount of bond $ 145.00
Date issued
Original or renewal
Date stamps is to be affixed

NOW THEREFORE, THE CONDITION OF THE WITHIN BOND IS SUCH, that if said WALTER MOORE shall pay the balance and the accrued penalties with the interest aforesaid, to the said Collector at the expiration of said extended period, then and in that event, the above application shall be void; otherwise to be in full force and virtue.

WITNESSES: Harold W. Tindle

Walter Moore (15)

ROYAL INDEMNITY COMPANY,

BY [redacted]
RESIDENT VICE-PRESIDENT

ATTEST:

BY [redacted]
ASSISTANT SECRETARY

Bond No. SX-59500
$58000
Rec

[redacted]

15

10A

Exhibit "B" attached to Stipulation of Facts.

ROYAL INDEMNITY COMPANY

CHARLES H. HOLLAND, PRESIDENT

BOND NO. SX -81670

AMOUNT $ 38,000.00

KNOW ALL MEN BY THESE PRESENTS, That we, WALTER MOORE, of 27 Beaver Street, City, County and State of New York, as Principal, and the ROYAL INDEMNITY COMPANY, a corporation organized under the laws of the State of New York, having an office and principal place of business at No.84 William Street, Borough of Manhattan, City and County of New York, as Surety, are held and firmly bound unto FRANK K. BOWERS, Collector of Internal Revenue, Second District of New York, and to his successor in office, in the sum of Thirty-eight thousand and 00/100($38,000.00) Dollars, lawful money of the United States of America, to be paid to the said Collector, to which payment, well and truly to be made, said Principal and Surety bind themselves, their successors and assigns, jointly and severally, firmly by these Presents.

SEALED with our seals and DATED this 2nd day of May, 1928.

WHEREAS, WALTER MOORE, the above mentioned principal, has been assessed by the Internal Revenue Department of the United States in the sum of Twenty-nine thousand one hundred twenty-eight and 82/100 ($29,128.82) Dollars, under the Revenue Act of and (List of page. ; line ; and

WHEREAS, WALTER MOORE has requested that FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York, whose duty it is to collect said assessment, to refrain from and suspend the collection thereof and such interest as may accumulate thereon for a period of twelve (12) months from date hereof, in order that he may have an opportunity to pay so much thereof as remains unpaid with the interest thereon until paid as required by law, which at the present time amounts to Thirty-seven thousand two hundred eighty-four and 89/100($37,284.89) Dollars.

NOW, THEREFORE, the condition of the within bond is such, That if said WALTER MOORE shall pay the balance and the accrued penalties with the interest aforesaid, to the said Collector at the expiration of said extended period, then and in that event, the above obligation shall be void; otherwise to be in full force and virtue.

WITNESSES:

Walter Moore. (Principal)

ROYAL INDEMNITY COMPANY, Wm. W. Lafferty

By Resident Vice-President

M. A. Petit

Resident Assistant Secretary

Executed in Duplicate.

16

hec

10B

Exhibit "C" attached to Stipulation of Facts.

ROYAL

BONDING CLAIMS DEPARTMENT No. B 7877
HEAD O/FICE: NEW YORK

December 17 1926 19

Pay to the order of Collector of Internal Revenue

XXX EIGHTY TWO HUNDRED TWENTY THREE 67/100XXXXXXX DOLLARS

IN FULL PAYMENT OF THE CLAIM OR ACCOUNT STATED BELOW

To ROYAL INDEMNITY COMPANY through The New York Trust Company NEW YORK, N. Y.

$ 8223.67

THE ENDORSEMENT OF THIS DRAFT CONSTITUTES A RELEASE AND RECEIPT IN FULL PAYMENT OF THE FOLLOWING CLAIM OR ACCOUNT (IF INCORRECT RETURN WITHOUT ALTERATION)

FILE NO.	BOND NO.	CLAIM NO.	INSURED	PRINCIPAL
107283	SX 8167 0	11033	U. S.	Walter Moore

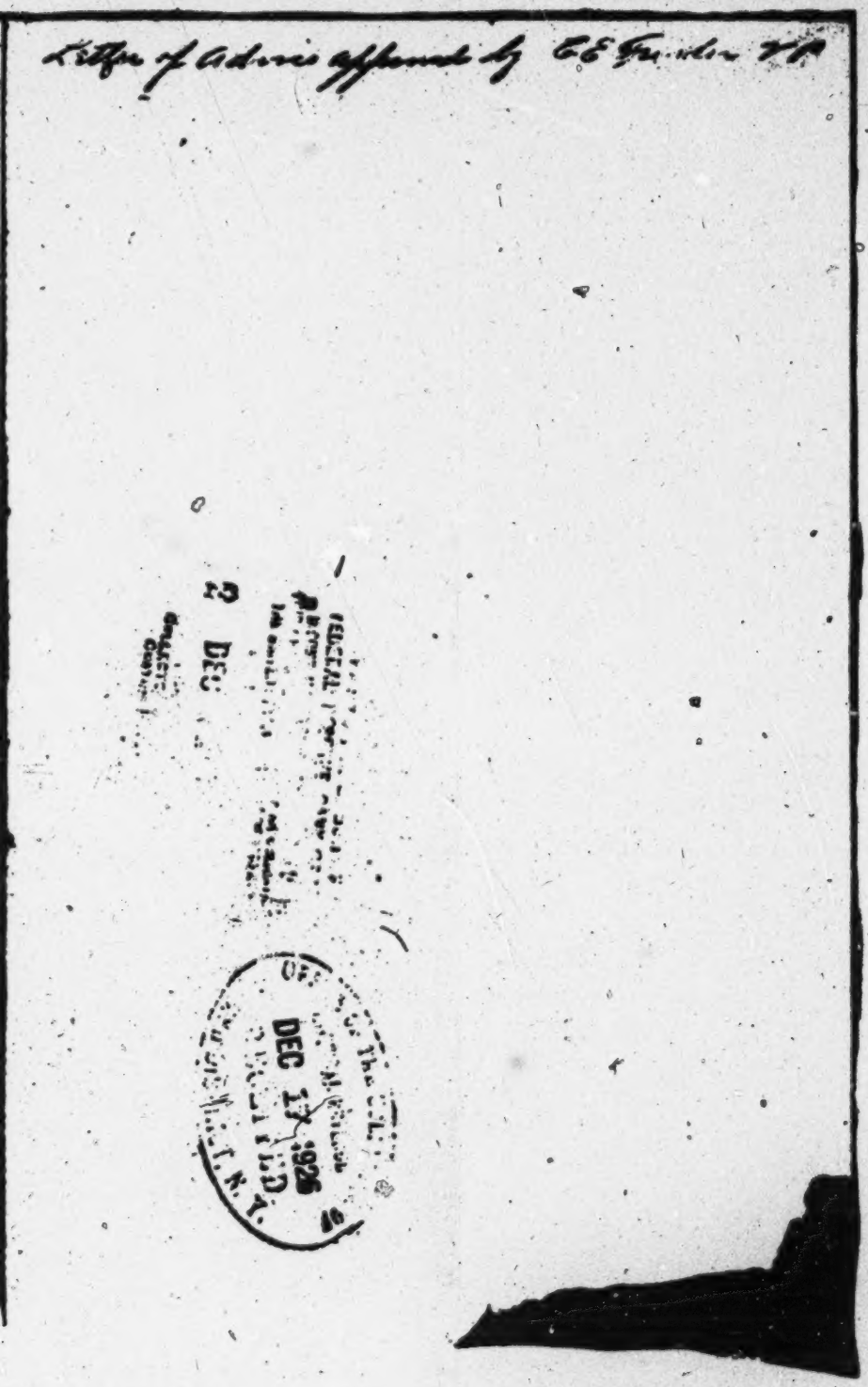
PARTICULARS:

In full settlement of all taxes assessed for the period of the calendar year 1917 and in full settlement of all liability under bond SX 81670, Walter Moore principal

DEC 18 1926 FEDERAL RESERVE BANK

Letter of Advice effected by C.E. Franklin Ltd

17-18



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[fol. 19] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE AND MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

SIR:

Please take notice that upon the complaint and answer in the above entitled action and upon the stipulation of facts dated January 23, 1940, the undersigned will move this Court for judgment in favor of the plaintiff at a stated term for the hearing of motions to be held in and for the Southern District of New York at room 506, United States Court House, Borough of Manhattan, City of New York, on the 30th day of January, 1940, at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 23, 1940.

Yours, etc., John T. Cahill, United States Attorney for the Southern District of New York, Attorney for the Plaintiff, Office & P. O. Address, United States Court House, Foley Square, New York, N. Y.

To: Harry S. Hall, Esq., Attorney for the Defendant, 51 Chambers Street, New York, N. Y.

[fol. 20] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF COUNTER MOTION AND COUNTER MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

SIR:

Please take notice that upon the complaint and answer in the above entitled action and a stipulation of facts dated January 23, 1940, the undersigned will move this Court for judgment in favor of the defendant to dismiss a cause of action at a stated term for the hearing of motions to be held in and for the Southern District of New York at Room 506, United States Court House, Borough of Manhattan, City of New York, on the 30th day of January, 1940, at 10:30 in the forenoon of that date or as soon thereafter as counsel can be heard.

Dated, New York, N. Y., January 29, 1940.

Yours, etc., Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City, N. Y.

To: John T. Cahill, United States Attorney, United States Court House, Foley Square, New York, N. Y.

[fol. 21] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

DEFENDANT'S COUNTER MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Royal Indemnity Company by its Attorney of Record and moves the Court to disallow the motion of the plaintiff for summary judgment; and further moves the Court to dismiss the cause of action because as a matter of law the plaintiff is not entitled to recover. The said motion is based upon the complaint and answer and the stipulation of facts dated January 23, 1940.

Respectfully, Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York City, N. Y.

[fol. 22] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

OPINION OF BONDY, J.

BONDY, District Judge:

The defendant does not seriously dispute that under the terms of its bond it assumed liability for interest accruing upon the deficiency determined by the Commissioner after consideration of the taxpayer's claim in abatement. It contends that the collector nevertheless had authority to terminate its liability under the bond and that the government's only recourse is to the official bond given by the collector to secure the faithful performance of his duties.

The facts herein have been stipulated and both parties agree that the only substantial question of law is whether the United States is bound by the act of the collector in returning the bond to the defendant with a letter stating that all liability thereunder was terminated.

While the obligee named in the bond is Frank K. Bowers, Collector of Internal Revenue for the Second District of New York and his successor in office, it is apparent that the bond was not intended merely for the personal benefit of the collector, but was also designed to secure the payment of any tax found due, as the stipulation of facts expressly [fol. 23] states. Accordingly the United States is the real

party in interest and is entitled to bring suit upon the bond. Hilton Lumber Co. v. Grissom, 70 F. (2d) 892, certiorari denied 293 U. S. 613; United States v. Jureidini, 35 F. (2d) 57; cf. Gulf States Steel Co. v. United States, 287 U. S. 32. It is immaterial that there was no express statutory authority for the collector to accept the bond. United States v. Fidelity & Deposit Co., 80 F. (2d) 24, certiorari denied 298 U. S. 665; United States v. Wolper, 36 F. (2d) 715.

Since the bond obligated the defendant to pay interest, the collector had no authority to compromise the defendant's liability to the United States as the real obligee of the bond, by foregoing the payment of accrued interest. Hughson v. United States, 59 F. (2d) 17, 19, certiorari denied 287 U. S. 630; United States v. Steinberg, 100 F. (2d) 124, 126; cf. Botany Worsted Mills v. United States, 278 U. S. 282. The collector's act is not binding on the United States. See United States v. Globe Indemnity Co., 94 F. (2d) 576, certiorari denied 304 U. S. 575; Wilber National Bank v. United States, 294 U. S. 120, 123.

It is not significant that an action may be maintained upon the collector's official bond. The existence of such a right of action does not confer authority upon the collector to bind the United States.

The defendant does not dispute that the accrued interest owing on December 17, 1926, the day the defendant paid the principal amount of the tax deficiency, was $4,169.07. The plaintiff, however, is not entitled to recover interest upon the accrued interest in the absence of agreement or statute. Cherokee Nation v. United States, 270 U. S. 476, 490; Young v. Hill, 67 N. Y. 162, 167; 5 Williston, Contracts (Rev. Ed.) Section 1417. Moreover, the exaction from the defendant of interest upon the accrued interest would be inequitable in [fol. 24] view of the collector's action in returning the bond to the defendant with the statement that all liability thereunder was terminated, despite the fact that his action does not bar the recovery of the accrued interest, and in view of the delay in the institution of this action. See Board of County Commissioners, Jackson County, Kansas v. United States, 308 U. S. 343, 350, 352.

The defendant's motion for summary judgment accordingly is denied and the plaintiff's motion granted in the amount of $4,169.07.

April 15, 1940.

Wm. Bondy, United States District Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ORDER AND JUDGMENT

The plaintiff herein having moved this Court for summary judgment against the defendant in the sum of $4,169.07 together with interest at 6% per annum from December 17, 1926 and costs and disbursements, according to law, and the defendant having moved this Court for judgment in its favor dismissing the complaint upon the hearing of the plaintiff's motion for summary judgment, and said mo- [fol. 25] tions having come on to be heard before the Honorable William Bondy, one of the Judges of this Court, on January 30, 1940, and John T. Cahill, United States Attorney for the Southern District of New York, by Noel Hemmendinger, Assistant United States Attorney, having been heard in support of the plaintiff's motion, and Harry S. Hall, Esq., attorney for the defendant, having been heard in opposition thereto, and in support of the defendant's motion, and due deliberation having been had, and this Court having handed down its memorandum decision dated April 15, 1940,

Now, on motion of John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, it is hereby

Ordered, adjudged and decreed that the plaintiff's motion for summary judgment be and the same hereby is granted in the sum of $4,169.07 together with costs, but without interest, and in all other respects be and the same hereby is denied; and it is

Further ordered, adjudged and decreed that the defendant's motion for summary judgment be and the same hereby is denied, and it is

Further ordered, adjudged and decreed that the plaintiff recover from the Royal Indemnity Company, the defendant, the sum of $4,169.07, together with $22.12 costs as taxed, and that execution issue therefor.

Dated, New York, N. Y., April 26, 1940.

Approved.

Bondy, U. S. D. J.

Judgment rendered April 27, 1940.

George J. H. Follmer, Clerk.

[fol. 26] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL OF DEFENDANT

SIR:

Please take notice that the defendant in the above action hereby appeals to the Circuit Court of Appeals for the Second Circuit from the order and judgment of this Court entered April 27, 1940, that the plaintiff recover from the defendant the sum of $4,169.07.

Dated, New York, N. Y., July 1, 1940.

Harry S. Hall, Attorney for Defendant, Royal Indemnity Company, Office & P. O. Address, 51 Chambers Street, New York, N. Y.

To: John T. Cahill, United States Attorney for the Southern District of New York, Attorney for Plaintiff.

[fol. 27] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

CROSS NOTICE OF APPEAL OF PLAINTIFF

SIR:

Please take notice that the plaintiff in the above entitled action hereby appeals to the Circuit Court of Appeals for the Second Circuit from so much of the judgment of this court entered April 27, 1940 as denies the claim of the plaintiff for interest.

Dated, New York, N. Y., July 2, 1940.

Yours, etc., John T. Cahill, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office & P. O. Address, United States Courthouse, Foley Square, New York, N. Y.

To: Harry S. Hall, Esq., Attorney for Defendant, 51 Chambers Street, New York, N. Y.

[fol. 28] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

STIPULATION AS TO THE RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, August 9, 1940.

Harry S. Hall, Attorney for Defendant. John T. Cahill, United States Attorney for the Southern District of New York.

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 69—October Term, 1940

Argued October 23, 1940 Decided December 9, 1940

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

ROYAL INDEMNITY COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

From a judgment for the United States in an action against the surety on a bond given to a collector of internal revenue to secure payment of income taxes, both parties have appealed. Judgment modified.

Before: Swan, Chase and Clark, Circuit Judges.

Harry S. Hall, Attorney for defendant-appellant.

John T. Cahill, United States Attorney for plaintiff-appellant; Edward J. Ennis, Assistant U. S. Attorney, of counsel.

[fol. 31] SWAN, Circuit Judge:

This is an action by the United States against the surety on a bond given by a taxpayer as principal to a collector of internal revenue as obligee. The bond, dated May 2, 1922, for $38,000 was given in order to obtain suspension of collection of an income tax deficiency for the year 1917, as to which the taxpayer had filed with the commissioner of internal revenue a claim in abatement. It was conditioned on payment of so much of the deficiency as should not be abated, with interest thereon.

In 1925 the commissioner allowed in part the taxpayer's claim in abatement and rejected it in the amount of $8,223.67. Demand for payment of this sum plus interest (a total of some $14,500) was made on the taxpayer and, upon his default, on the surety. The latter disputed the amount of its liability. On December 17, 1926 it tendered the collector a draft for $8,223.67, representing the unabated deficiency alone without interest. This draft bore on its face a

notation that it was in full settlement of the taxes for 1917 and of all liability under the bond. The draft was collected, and on December 20, 1926 the collector returned the bond to the surety with a letter stating: "All liability under this bond is hereby terminated." Thereafter, in 1932, the then collector demanded from the surety payment of the interest on the unabated deficiency of $8,223.67. Payment being refused, this action was commenced on April 27, 1935. Upon complaint, answer and stipulated facts, each party moved for summary judgment. The district judge gave judgment for the plaintiff in the sum of $4,169.07 representing the interest on the deficiency to December 17, 1926, but denied any recovery of interest on this amount. Both parties have appealed, the defendant contending that the collector's release prevents any recovery, and the plaintiff challenging denial of interest on the sum found due under the bond on December 17, 1926.

[fol. 32] On the defendant's appeal the sole question is whether the collector had implied authority to release the bond. He had implied authority to accept the bond. United States v. Wolper, 86 F. 2d 715, 717 (C. C. A. 2). Having implied authority to accept it, the argument is urged that logically he must have implied authority to release it. This does not follow. Authority to do acts beneficial to the government in the collection of taxes may be implied, but it is well recognized that subordinate officials cannot surrender rights of the United States without express authority so to do. Hart v. United States, 95 U. S. 316, 318; United States v. Globe Indemnity Co., 94 F. 2d 576 (C. C. A. 2); Ritter v. United States, 28 F. 2d 265, 267 (C. C. A. 3). On December 17, 1926 the principal and surety were liable under their bond for the deficiency tax of $8,223.67 and interest thereon of $4,169.07. Only the commissioner, with the consent of the Secretary of the Treasury, was authorized to compromise the tax deficiency for a sum less than was legally due. Rev. Stat. §3229 (26 U. S. C. A. §1661, 1935 ed.); Botany Mills v. United States, 278 U. S. 282, 288; L. Loewy & Son v. Commissioner, 31 F. 2d 652, 654 (C. C. A. 2); 45 Treas. Reg. Art. 1011 (1918 Act). If the collector was not authorized to compromise the taxpayer's liability for the tax, there is no reason to suppose he would have authority to compromise the contractual liability of the obligors of the bond to pay such tax, or to release it by returning the bond.

Two cases seem to support the taxpayer's position. In Brewerton v. United States, 9 F. Supp. 503, the Court of Claims ruled that a bond taken by a collector could be released by him. In so holding it purported to follow United States v. Alexander, 110 U. S. 325. This was a misapplication of the Alexander case for there the cancellation of the warehouse bond was done by the Secretary of the Treasury pursuant to express statutory authority; no question of implied authority was involved. In Heinemann Chemical Co. [fol. 33] v. United States, 92 F. 2d 302, the third circuit followed the Court of Claims and similarly misapplied the Alexander case. With due respect, we are unable to agree with the Brewerton and Heinemann decisions. For reasons already stated we think the collector was without authority to release the defendant's liability by returning its bond with the statement that liability thereon was terminated. Nothing in our own decision in United States v. Globe Indemnity Co., 94 F. 2d 576, is to the contrary; indeed it tends to support the view now expressed.

Upon the plaintiff's appeal it is urged that interest should have been allowed upon the amount found due from the defendant December 17, 1926. The district judge regarded it as a claim for interest upon interest, and thought it inequitable to allow it under the circumstances. This is not a case of interest upon interest; the surety's liability was an obligation undertaken by contract to pay $4,169.07 more than it actually paid on December 17, 1926. In New York breach of contract to pay a liquidated sum normally carries interest at 6 per cent per annum to the date of judgment. New York Gen. Bus. Law, §370. How equities have anything to do with the application of this rule we fail to see. Nor do we find anything inequitable in charging a surety interest for his own default—particularly since the surety is chargeable with notice that a collector has no power to release the government's rights, and has had the use of the money which should have been paid to the collector when due. See United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 528. At least three circuits have decided in favor of the allowance of interest under similar circumstances. Maryland Casualty Co. v. United States, 76 F. 2d 626 (C. C. A. 5); United States v. Hamilton, 96 F. 2d 878 (C. C. A. 7); Mass. Bonding & Ins. Co. v. United States, 97 F. 2d 879 (C. C. A. 9). The cases cited to the contrary relate to non-analogous situations.

[fol. 34] On the defendant's appeal the judgment should be affirmed; on the plaintiff's appeal it should be modified to include interest at the rate of 6 per cent per annum from December 17, 1926, and, thus modified, affirmed. It is so ordered.

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of December, one thousand nine hundred and forty.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ROYAL INDEMNITY COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court on the defendant's appeal be and it hereby is affirmed; on the plaintiff's appeal said judgment is modified to include interest at the rate of 6% per annum from December 17, 1926, and, thus modified, is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 36] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Royal Indemnity Company. Order for Mandate. United States Circuit Court of Appeals. Filed Dec. 26, 1940. D. E. Roberts, Clerk, Second Circuit.

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 7, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,166. U. S. Circuit Court of Appeals, Second Circuit. Term No. 817. The Royal Indemnity Company, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 6, 1941. Term No. 817, O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 817

THE ROYAL INDEMNITY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

HARRY S. HALL,
Attorney for Petitioner.

LOUIS APPEAL PRESS, INC., 65-67 Duane St., N. Y. C. Tel. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE ROYAL INDEMNITY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

The petitioner, The Royal Indemnity Company, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause, December 26, 1940. Opinion filed December 9, 1940.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 247.

The opinion of the District Court is in the record (R., pp. 22-24).

Jurisdiction.

The opinion of the Circuit Court of Appeals was filed December 9, 1940 (R., pp. 30-34) and judgment entered December 26, 1940 (R., p. 35). The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13,

1925, as amended by the Act of May 22, 1939. Section 347, Title 28, Code of Laws, U. S. 1934 Ed.

Questions Presented.

1. Whether the Collector of Internal Revenue is vested with implied power derived from his expressed power to collect taxes as provided by Section 3183 R. S. and Section 1541 (a) 26 U. S. C. and to give receipts for all taxes collected as provided by Section 1549, 26 U. S. C., to accept in his name as such collector a surety bond and stay the collection of taxes pending a decision on a claim in abatement and after such decision and demand by the collector for payment, and payment by the surety which payment was accepted by the collector as full satisfaction of liability of the bond, discharges the surety from all liability thereunder and cancel and return the bond to it.

2. Whether under the terms of a surety bond (the bond involved herein) given by a taxpayer to a collector of Internal Revenue to stay collection of taxes pending a decision of a claim in abatement, which bond makes no reference to a state law[1] providing interest at the legal rate of 6%, is the surety liable for such interest.

3. Whether a surety on a bond given by a taxpayer to a collector of Internal Revenue to stay collection of taxes pending a decision of a claim in abatement is liable to the United States for a legal rate of interest at 6% provided by New York State Law[2], or any other law and the United

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1 and 2. Section 370. New York Gen. Bus. Law.

"The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year; and at that rate for a greater or less sum, or for a longer or shorter time."

The New York Courts in construing this statute have held: that interest is only allowed when there is a contract express or implied to pay interest, or as damages for the non-payment of money due. *Matter of New York, etc., Bridge*, 137 N. Y. 95. Claims unliquidated do carry interest. *Sloan v. Baird*, 162 N. Y. 327. Interest may be waived by acceptance of principal; *McCreery v. Day*, 119 N. Y. 1; Cutter 1. New York, 92 N. Y. 166.

States being guilty of laches without just excuse in not instituting and prosecuting suit for more than nine years after the accrual of the right.

Statutes and Regulations Involved.

So far as petitioner has been able to ascertain there is no Internal Revenue Law expressly empowering the collector to accept a surety bond from a taxpayer[3], to stay the collection of taxes. There is no Internal Revenue Law expressly empowering the collector, the Commissioner of Internal Revenue, or any other officer of the government to cancel such bonds and discharge sureties from liability, even where the provisions of the bond have been fully complied with[4]. Necessarily, therefore, their power to do so must be implied.

The implied power of the collector to discharge sureties from liability of such bonds is derived from the following statutes:

Collection Authority.

(a) In general; within district.

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3 and 4. The Treasury Department has ruled that neither the Collector or Commissioner of Internal Revenue are vested with express statutory power to rescind and cancel surety bonds. The ruling is as follows: "This office is of the opinion that, even where payments by a principal or a surety satisfy the liability under a bond there is no provision of law authorizing the Commissioner or Collector to issue to a principal or surety a certificate of release therefrom and that accordingly, there is no authority for the execution of the form submitted by the surety in the instant case purporting to release the surety from further liability under the bond furnished by it. The bond, therefore, should be retained in the files of the Bureau. However, if the Bureau is satisfied that the taxpayer or surety have paid the amounts of the tax and interest covered by the bond in accordance with the terms of the extension granted the collector or the Bureau may so advise the surety". G. C. M., 8980, Cum. Bull. X-1, page 256. See also, 4 opinion. Atty. Gen., 312, 7, opinion, Atty. Gen. 62, 33, opinion. Atty. Gen. 441. Since it appears that the Collector and Commissioner lack express power to cancel and return the bond, and since it is ruled by the Bureau they may advise the principal and surety that the tax liability has been satisfied. It is reasonable and logical they are vested with implied power to cancel and return the bond.

"It shall be the duty of the collectors or their deputies, in their respective districts and they are authorized to collect all the taxes imposed by law, however the same may be designated." See 1541 (a) 26 U. S. C.

(b) Receipts for taxes; in general.

"Every collector and deputy collector shall give receipts for all sums collected by him. * * * " Section 1549, 26 U. S. C.

Statement.

The facts in the record and as stated by the Circuit Court of Appeals may be summarized as follows:

This is an action by the United States against the surety on a bond given by a taxpayer as principal to the collector of Internal Revenue for the Second Collection District of New York (R., pp. 2-10).

The bond dated May 22, 1922, in the sum of $38,000.00 was given to obtain a stay of collection of an income tax deficiency for the year 1917, as to which the taxpayer had filed a claim in abatement with the Commissioner of Internal Revenue. The bond was conditioned on payment of so much of the deficiency as should not be abated with interest (R., pp. 11-12, Ex. B, p. 16).

Under date of February 18, 1925, the Commissioner of Internal Revenue allowed the claim in abatement in part and rejected it in the amount of $8,223.67. Demand was made by the Collector on the taxpayer for payment and upon his default, on the surety (R., p. 12).

On December 17, 1926, the surety paid to the collector by draft the sum of $8,223.67 in full settlement and for discharge of liability of the bond and the Collector so accepted the same. The draft bore on its face a notation that it was in full settlement of the taxes for 1917, and

all liability under the bond. Thereafter and on December 20, 1926, the Collector cancelled the bond and transmitted it to the surety with a letter stating: "All liability under this bond is hereby terminated". The surety then closed the case in its files (R., pp. 13-14, Ex. C, p. 17).

Thereafter and on September 23, 1932, the then Collector of Internal Revenue made demand upon the surety for the payment of an additional sum as interest. The surety refused to pay the same, or any other amount relying upon the payment and settlement of December 17, 1926, and the cancellation and return of the bond to it of December 20, 1926 (R., p. 14).

Thereafter and on April 27, 1935, this action was commenced, and upon the complaint, answer and agreed statement of facts each party moved for summary judgment (R., pp. 2-10, 19-21).

The District Court entered judgment for the plaintiff in the sum of $4,169.07 and denied recovery for legal rate of interest at 6% provided by New York State Law (R., pp. 22-26).

Both parties appealed to the Circuit Court of Appeals, the surety from the judgment entered against it and the United States from the denial of the legal rate of interest at 6% as provided by New York State Law (R., pp. 26-27).

The Circuit Court on defendant's appeal affirmed the judgment of the District Court and on plaintiff's appeal modified the judgment to include interest at the rate of 6% per annum from December 17, 1926 (R., pp. 30-34).

Specification of Errors to Be Urged.

The Circuit Court of Appeals Erred:

1. In holding that the Collector of Internal Revenue lacked implied power to cancel and discharge the surety from liability under the provisions of the surety bond

and in affirming the judgment of the District Court for $4,167.07.

2. In holding, that under the terms of the surety bond the surety was liable for the legal rate of interest at 6% provided by New York State Law from December 17, 1926.

3. In holding, that notwithstanding the laches of the United States of approximately nine years in the institution and prosecution of its claim; that the United States is entitled to recover interest at the rate of 6% as provided by New York State Law from December 17, 1926.

4. In failing to enter judgment for petitioner and dismissing the cause of action of the United States.

Reasons for Granting the Writ.

The decision of the Circuit Court that the Collector of Internal Revenue lacked implied power to cancel the bond and discharge the surety from liability thereunder is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Hinemann Chemical Co., et al.* v. *United States,* 92 F. (2d) 302-304. The Court there held that under Section 3183, R. S., 26 U. S. C., Section 1541 (a), which expressly authorized the Collector to collect all taxes, that he was vested with implied power to cancel such bonds and terminate liability thereunder.

The decision of the Circuit Court is also in direct conflict with the decision of the United States Court of Claims in *Brewerton* v. *United States,* 9 F. Supp. 503. The Court there held that the Collector of Internal Revenue was not only the proper party to advise the surety of the status of liability for which the bond was given, but was also the proper party to determine when the bond could be released and authorize its release.

The decision of the Circuit Court that the United States is entitled to recover interest at 6% provided by New York State Law, Section 370, New York Gen. Bus. Law, *supra*, is in direct conflict with the decision in *United States* v. *Wagner*, 93 F. (2d) 77, 79.

The decision of the Circuit Court that the United States is entitled to recover interest at 6% provided by New York State Law, notwithstanding its laches of approximately nine years in instituting and prosecuting the suit is in direct conflict with the decisions of this Court in *Redfield Executrix* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176; *United States* v. *Sanborn*, 135 U. S. 271, 281, 282, *Redfield* v. *Bartels*, 139 U. S. 694, and the decisions of the lower Federal Courts as follows: *Mason* v. *Walkowich*, 150 F. 699, 700, 706; *Jourolmon* v. *Ewing*, 80 F. 604, 607, 608; *Stewart* v. *Schell*, 31 F. 65, 66; *Mitchell* v. *Kelsey*, F. Cas. No. 9, 664. In the *Ystalyfera* case, the Court there held when interest is recoverable not as a part of the contract but by way of damages, if plaintiff has been guilty of laches in unreasonably delaying the prosecution of its claim interest may be properly withheld. In the *Sanborn* case, the Court held the same rule applied to the government.

The questions presented are of considerable importance to taxpayers, sureties and the government. Collectors in the collection of the taxes negotiate directly with taxpayers and sureties with reference to amounts due, stay of collection and surety bonds, and as a whole are the only official that do.

Although there is no express statutory authority empowering collectors to accept surety bonds the practice has long been permitted and recognized[1]. He is the sole negotiator in reference to them and his acts, negotiations and discharge of liability have been, and are relied on by

1. *United States* v. *Wolper*, 86 F. (2d) 715, 717.

taxpayers and sureties as valid and binding and is a very important matter in the collection of the revenue and the uncertainty with reference to his authority especially with reference to his authority to accept and terminate liability of surety bonds tends to confusion and taxpayers and sureties cannot safely rely upon negotiations with collectors. It is clearly apparent therefore, that the problem here presented will constantly recur unless finally settled by the Court and the questions are of general importance.

Therefore, it is repectfully submitted that this petition for a writ of certiorari should be granted.

March, 1941.

Respectfully submitted,

HARRY S. HALL,
Attorney for Petitioner,
Royal Indemnity Co.,
51 Chambers Street,
New York, N. Y.

BRIEF.

Statement of Fact.

The facts are stated in the petition, pages 3, 4.

Argument.

POINT I.

The Collector of Internal Revenue was vested with implied power to cancel the bond and release the surety from further liability. This implied power is derived from his expressed and exclusive power over the collection of taxes vested in him by Section 3183, R. S., 26 U. S. C., Section 1541 (a) and Section 1549, *supra*.

Expressed power is not granted to either the Commissioner or Collector of Internal Revenue to cancel and release liability and return surety bonds to the surety. This the Treasury Department has so ruled. G. C. M., 8980, Cum. Bull., X-1, page 256. See, also, opinions of Attorney General, Vol. 4, page 312, Vol. 7, page 62, Vol. 33, page 441, *supra*. In the Treasury ruling, *supra*, it was said: "However, if the bureau is satisfied that the taxpayer and/or the surety in this case have paid the amounts of the tax and interest and/or penalty covered by the bond in accordance with the terms of the extension granted the Collector or bureau, may so advise the surety". By the foregoing, it is clear that the Treasury Department recognizes that the bureau and Collector are vested with implied power to notify the surety that the bond has been satisfied, this is equivalent to a release or discharge of liability of the bond and the return of it to the surety.

The bond must be filed with the Collector who, alone, is vested with exclusive express power over the collection of the taxes and thereby he is vested with all other power (im-

plied power) necessary within his discretion for the proper performance of his duties and one of such implied powers, authorized him to cancel and return the bond to the surety. The taxpayer is not alone interested. The surety is vitally concerned. The Collector is the only officer of the government vested with exclusive power over the collection of the taxes. The bond is filed with him and all negotiations with reference to the taxes and the bond are with the Collector and with no other, and the surety is justified in relying on the action of the Collector in cancelling and returning the bond to it, as being valid under the Collector's implied power.

The following authorities directly support the aforegoing contention: *Hinemann Chemical Co.* v. *U. S.*, 92 F. (2d) 302, 303, 304; *Brewerton* v. *U. S.*, 9 F. Supp. 503, 505, 507, *supra*; *Rives, et al.* v. *U. S.*, 28 Ct. Cls. 249, 251.

The law is well settled that a governmental officer, which should include Collectors of Internal Revenue, and which we think does, in addition to the powers expresaly conferred on them have by implication such powers as are necessary for the due and efficient exercise of the powers expressly granted. Respectfully, we contend that these legal principles apply to the fact situation of the case at Bar and as illustrating the application of the legal principle of implied power vested in the Collector to cancel and return the bond to the surety, we cite the following authorities:

Haynes v. *Butler*, 30 Ark. 69;
Reliance Mfg. Co. v. *Board of Prison Commissioners*, 161 Ky. 135, 142;
State v. *Illinois Cent. R. Co.*, 92 N. E. 814, 815, 832;
State v. *Younkin*, 108 Kansas 634, 638;
State v. *Hackmann*, 276 Mo. 110, 116;
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State v. *Burleigh County*, 19 N. D. 819, 834, 835;

State v. *Hildebrant*, 93 Oh. 1, 2, 11, 12;
State v. *Great Northern R. Co.*, 68 Wash. 257, 262;
Kasik v. *Janssen*, 158 Wisc. 606, 609, 610;
State v. *Rose*, 140 Wis. 360;
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State on inf., McKittrick v. *Wymore*, 132 S. W. 2d 979;
State, ex rel., Taylor v. *Superior Court of Kings County*, 98 P. 2d 985;
O'Neil v. *Goldenetz*, 85 P. 2d 705;
Cornell v. *Harris*, 88 P. 2d 498;
Guillot v. *State Highway Commission of Montana*, 56 P. 2d 1072;
Board of Education of Boyd County v. *Trustees of Buena Vista School*, 256 Ky. 432.

The Circuit Court of Appeals in its decision fails to consider that the decision in the *Hinemann Chemical Co.* case, and the decision of the Court of Claims in the *Brewerton* case, *supra*, were mainly based on the implied power of the Collector derived from the express power, vested in him over the collection of the taxes and not wholly and alone, based on the decision in *U. S.* v. *Alexander*, 110 U. S. 325. The question of implied power was not involved in the *Alexander* case. The main question involved was the power of the Secretary of the Treasury to reopen the case, once closed. Therefore, we respectfully disagree with the Circuit Court of Appeals, that there was a misapplication of the *Alexander* case to the decision in the *Hinemann Chemical Co.* and *Brewerton* cases.

The cancellation and return of the bond to the surety does not discharge the taxpayer from liability nor the Collector for he has given bond to protect the govern-

ment. Sec. 1733 (a), (b), (c), (d), P. 1206, Title 26, Code of Laws, United States 1934 Edition. Therefore, the government has a right of action against the taxpayer and the Collector, unless the action is barred by the Statute of Limitations.

There is no Statute of Limitation applying to this action, in so far as the petitioner has been able to ascertain. However, there are Statutes of Limitations applying to taxes and interest involved, and other actions both for and against the government[1], and following the policy of the Statute of Limitations, there should be such limitation of the action in the case at Bar and the government's right to recover, should be barred by the Statute of Limitations. The equities of the case at Bar should be considered in the light of all these circumstances.

POINT II.

The bond, the basis of this action, makes no reference either expressly or by inference to interest provided by Section 370, New York Gen. Bus. Law (see bond, Exhibit B, R., p. 16). Such interest, therefore, was not in contemplation of the parties to the contract of surety and, therefore, cannot be said to be a part of the contract. Only interest provided by the Internal Revenue Law may be considered as in contemplation of the parties and thereby an element of the contract. *United States* v. *Wagner*, 93 F. (2d) 77, 79. It is clear, therefore, if the surety under any circumstances is liable for the legal rate of

---

1. Limitation to bring actions against the United States in U. S. Courts and Court of Claims is generally six years. Section 41 (20) (Judicial Code, Section 24 Amended); Section 262, Title 28, Code Laws, U. S. 1934 Ed.

Limitation of actions against sureties in certain cases is five years. Section 5, Title 6, Code Laws, U. S. 1934 Ed.

Limitation actions, U. S. Court of Claims, generally six years. Section 262, Title 28, Code of Laws, U. S. 1934 Ed.

Limitation on assessment of Internal Revenue tax, four years. Proceedings in Court to collect tax, five years. Section 1432 (a), Title 26, Code of Laws, U. S. 1934 Ed.

Limitation on estate tax, three years, suits in Court, three years. Section 474, Title 26, Code of Laws, U. S. 1934.

interest provided by New York State Law, it is by way of damages and which will be fully considered in the next point.

POINT III.

The undisputed facts of the case at Bar disclose that the government is guilty of gross laches in asserting its claim and in instituting and prosecuting its suit. It was approximately eighteen years after the tax was due, and nine years after payment by the surety, the cancellation and return of the bond to it, that the government instituted this action to enforce its claim (see dates of Complaint, R., 7, cancellation and return of the bond, R., 10, 11, 13). The law is well settled that where such interest is claimed as damages and not as a part of the contract, interest will not be allowed if the creditor is guilty of laches. *U. S.* v. *Sanborn*, 135 U. S. 271, 281, 282; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *Redfield* v. *Bartels*, 139 U. S. 694; *Mason* v. *Walkowich*, 150 F. 699, 700, 706; *Jouralmon* v. *Ewing*, 80 F. 604, 607, 608; *Stewart* v. *Schell*, 31 F. 65, 66; *Mitchell* v. *Kelsey*, F. Cas. No. 9, 664, Section 32, page 190, Vol. 33, C. J. The same rule has been held by this Court to apply to the government. *U. S.* v. *Sanborn*, 135 U. S. 271, 281, 282, *supra*.

The petitioner, Royal Indemnity Co., respectfully urges that the writ of certiorari should be granted and the case considered by this honorable Court and the opinion and judgment of the Circuit Court of Appeals should be reversed and the cause of action dismissed.

March, 1941.

Respectfully submitted,

HARRY S. HALL,
Attorney for Petitioner,
Royal Indemnity Co.,
51 Chambers Street,
New York, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 817.

ROYAL INDEMNITY COMPANY,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

HARRY S. HALL,
Counsel for Petitioner.

NATHANIEL E. WHEELER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

ROYAL INDEMNITY COMPANY,
Petitioner,

AGAINST

No. 817.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

This is a suit by the United States to recover on a surety bond given by a taxpayer, as principal, to the Collector of Internal Revenue and is here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

Opinions of the Court Below.

The opinion of the District Court is in the record (R., pp. 22-24) and is unreported.

The opinion of the Second Circuit Court of Appeals is reported in 116 F. (2d) 247.

Jurisdiction.

The date of the judgment to be reviewed is December 26, 1940.

The writ of certiorari was granted by this Court on the 7th day of March, 1941. The jurisdiction of this Court is invoked under the judicial code, Section 240 (a) U. S. C. 347; as amended by the Act of February 13, 1939.

Cases believed to sustain the jurisdiction are:

General Electric Co. v. *Wabash Appliance Corporation*, 304 U. S. 364;
The Toledo Pressed Steel Co. v. *Montgomery Ward & Co.*, 307 U. S. 350.

Statement of the Case.

This is an action by the United States against the surety on a bond given by a taxpayer as principal to the Collector of Internal Revenue for the Second Collection District of New York (R., pp. 2-10).

The bond dated May 22, 1922, in the sum of $38,000.00 was given to obtain a stay of collection of an income tax deficiency for the year 1917, as to which the taxpayer had filed a claim in abatement with the Commissioner of Internal Revenue. The bond was conditioned on payment of so much of the deficiency as should not be abated with interest (R., pp. 11-12, Ex. B, p. 16).

Under date of February 18, 1925, the Commissioner of Internal Revenue sustained the claim in abatement in part and rejected it in the amount of $8,223.67. Demand was made by the Collector on the taxpayer for payment and upon his default, on the surety (R., p. 12).

On December 17, 1926, the surety paid to the collector by draft the sum of $8,223.67 in full settlement and for discharge of liability of the bond and the Collector so accepted the same. The draft bore on its face a notation that it was in full settlement of the taxes for 1917, and all liability under the bond. Thereafter and on December 20, 1926, the Collector cancelled the bond and transmitted it to the surety with a letter stating: "All liability

under this bond is hereby terminated." The surety then closed the case in its files (R., pp. 13-14, Ex. C, p. 17).

Thereafter and on September 23, 1932, the then Collector of Internal Revenue made demand upon the surety for the payment of an additional sum as interest. The surety refused to pay the same, or any other amount relying upon the payment and settlement of December 17, 1926, and the cancellation and return of the bond to it of December 20, 1926 (R., p. 14).

Thereafter and on April 27, 1935, this action was commenced, and upon the complaint, answer and agreed statement of facts each party moved for summary judgment (R., pp. 2-10, 19-21).

The District Court entered judgment for the respondent in the sum of $4,169.07 and denied recovery for legal rate of interest at 6% provided by New York State Law (R., pp. 22-26).

Both parties appealed to the Circuit Court of Appeals, the surety from the judgment entered against it and the United States from the denial of the legal rate of interest at 6% as provided by New York State Law (R., pp. 26-27).

The Circuit Court on petitioner's appeal affirmed the judgment of the District Court and on respondent's appeal modified the judgment to include interest at the rate of 6% per annum from December 17, 1926 (R., pp. 30-34).

Assignments of Errors.

The errors of the Circuit Court of Appeals are:

1. In holding that the Collector of Internal Revenue lacked implied power and discretion to cancel and discharge the surety from liability of the bond and return the bond to it and in affirming the judgment of the District Court of $4,167.07.

2. In holding that under the terms of the surety bond the surety was liable for a legal rate of interest at 6% provided by New York State Law from December 17, 1926.

3. In holding that, notwithstanding the laches of the respondent of approximately nine years in the institution and the prosecution of its claim, the United States is entitled to recover interest at the rate of 6% provided by New York State Law, from December 17, 1926 or from any other period.

4. In failing to enter judgment for petitioner and dismissing respondent's cause of action.

Summary and Order of Argument.

1. Petitioner contends that the Collector of Internal Revenue was vested with implied power and discretion to accept a surety bond in his name, as such collector, and cancel and return the surety bond to petitioner, and discharge it from all liability thereunder, such implied power and discretion is derived from his expressed power over the collection of taxes as provided by Section 3183 R. S.; and Section 1541 (a) 26 U. S. C. A., and to give receipts for all taxes collected as provided by Section 1549 (b) 26 U. S. C. A.

2. That the surety in any case is not liable for interest other than that provided by Internal Revenue Law, the only interest contemplated by the provisions of the surety bond and the parties thereto.

3. That the surety is not liable in any event for the legal rate of interest at 6% provided by New York State Law, or any other law, because not a part of the contract and in contemplation of the parties, and if interest is allowable at all, it is by way of damages and the respondent being guilty of gross laches of approximately nine years in instituting and prosecuting its claim, cannot recover such interest.

ARGUMENT.

POINT I.

The Collector of Internal Revenue was vested with implied power and discretion to cancel the surety bond and discharge petitioner from liability thereof and return the bond to it.

The argument follows in sequence with the summary of the argument.

The Collector of Internal Revenue is the only officer of the Government empowered and authorized to collect taxes. He is vested with exclusive jurisdiction over the collection of taxes. His authority is provided in the following section of the law: "It shall be the duty of the Collectors or their deputies, in their respective districts, and they are authorized to collect all the taxes imposed by law, however the same may be designated." Section 1541 (a) 26 U. S. C. A., Section 3183 R. S. derived from 13 Stat. 324, 14 Stat. 111.[1]

Collectors are authorized to give receipts for taxes provided as follows: "Every collector and deputy collector shall give receipts for all sums collected by him * * *" Section 1549 (b) 26 U. S. C. A.

The sole question presented under this point is whether the foregoing sections of the statute granting the collectors of Internal Revenue exclusive, expressed and supreme power over the collection of taxes, by implication, empowers him to accept a surety bond, stay collection, and terminate liability thereof.

---

1. 13 Stat. 239, Act of June 30, 1864, provided: That it shall be the duty of collectors aforesaid or their deputies, in their respective districts, and they are hereby authorized to collect all the duties and taxes imposed by this act, however the same may be designated" and as amended by the Act of July 13, 1866 (14 Stat. 111). "That it shall be the duty of the collectors aforesaid or their deputies, in their respective districts; and they are hereby authorized to collect all the taxes imposed by law however the same may be designated * * *."

The lower Courts have held that he has such power and if he has it must be by implication, because no expressed power is granted him in the statute. On this point in *U. S.* v. *Wolper*, 86 F. (2d) 715, the Court said: "It must be considered that there is no expressed authority for the collector to accept a bond under circumstances like those at Bar." The Circuit Court of Appeals below held that the collector possessed implied power to accept the surety bond saying: "He had implied authority to accept the bond." *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247, 248. The lower Courts have consistently held that such bonds accepted and approved by Collectors of Internal Revenue are valid and enforcible. *U. S.* v. *Fidelity and Deposit Co. of Maryland*, 80 F. (2d) 24, certiorari denied. *Fidelity and Deposit Co.* v. *U. S.*, 298, U. S. 665 and authorities there cited. It is observed that the collector was not expressly authorized to accept and approve such bond, however, the Courts have held them valid and enforcible and of course the result is that his acceptance and approval of the bonds is by implied power and in the exercise of discretion.

The lower Courts have also held that the Collector of Internal Revenue is vested with implied power and discretion derived from his exclusive, supreme, expressed broad powers over the collection of taxes, to discharge a surety from liability of a surety bond. This was held by the Circuit Court of Appeals of the Third Circuit, in *Hinemann Chemical Co.* v. *United States*, 92 F. (2d) 302, 303, 304, and although the decision was adverse to the government it acquiesced in the decision and did not apply for a review in this Court, and by the United States Court of Claims in *Brewerton* v. *United States*, 9 F. Supp. 503, 507, and although the decision was adverse to the government it did not apply for a review. In the *Hinemann Chemical Co.* case, the Court said:

"* * * The real question is whether or not the collector under the facts in this case, has authority to release the original bond for $43,350.00. If he did, the Court erred, for the collector did, as a fact, release the bond, and the question is whether or not he exceeded his authority * * *."

The Court continued:

"* * * Defendants say there is no expressed statutory authority conferred upon either the collector or commissioner to release a bond and the authority to do so must be implied as a necessary incident to the proper exercise of the authority expressly conferred upon them * * *."

The Court further said:

"It further appears that the collectors of Internal Revenue are the only persons expressly authorized to collect taxes * * *."

Section 3183 of the Revised Statutes provides that:

"Collection authority—(a) In general, in the district. It shall be the duty of the collectors or their deputies in their respective districts and they are authorized to collect all taxes imposed by law, however the same may be designated."

And the Court further said:

"* * * In view of the fact that the collector was the only person having statutory authority to collect the taxes from taxpayer, that the bond had been filed with him and all negotiations in regard to the taxes and bond had been with the collector, the

surety was justified in believing that the bond had been authoritatively released and rescinded and was so notified by the collector."

In the *Brewerton* case, the Court of Claims said:

> "* * * September 29, 1922 the Collector by letter advised the agents of the surety company: 'Since office letter dated September 11, 1922 was written, the schedule on which the allowance of the claim mentioned above has been received in this office, and the bond may be released.'
>
> "On the same date the Collector advised the taxpayer as follows: 'The bond may be released, as the tax liability for which it was issued has been terminated.' The bond was returned with the foregoing communication to the taxpayer * * *."

The Court then proceeded:

> "* * * In thus releasing the bond, the Collector was unaware that through the above adjustment and settlement the outstanding liability of $934.86 for 1918 for which the bond was issued had not been paid, and apparently the same was true of the plaintiff * * *."

The Court further saying:

> "Collection could have been made after the statutory period by recourse to the bond, had the bond remained in full force and effect. * * * The bond had however been cancelled and the Court finally said the collector was chargeable with the collection of taxes which have been assessed and to insure the performance of his duties, he is required to give bond. He was, therefore, not only the proper

party to advise the surety company of the status of the liability of which the bond was given, but also the proper party to determine when the bond could be released and authorize its release * * *."

After a careful research, counsel for the petitioner has been unable to find other authorities directly in point, but ample authorities in analogous cases cited *post*.

The opinion in these cases are reasonable and logical, the bond must be filed with the collector who has given bond to the government to insure the performance of his duties[2] and who, alone, is vested with exclusive, expressed power over the collection of taxes and thereby he is vested with all other power, implied power, necessary within his discretion, for the proper performance of his duties and one of such implied powers authorized him to cancel and return the bond to the surety. The taxpayer is not alone interested. The surety is vitally concerned. The bond in the case at Bar runs in his name as such collec-

---

2. Sec. 1733. Bonds—(a) Original execution. Every collector, before entering upon the duties of his office, shall execute a bond for such amount as may be prescribed by the Commissioner, under the direction of the Secretary, with not less than five sureties, to be approved by the General Counsel for the Department of the Treasury conditioned that said collector shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary, all public moneys which may come into his hands or possession. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; May 10, 1934, c. 277, Sec. 512 [b], 48 Stat. 759.)

(b) Renewal. Every collector shall, from time to time, renew, strengthen, and increase his official bond, as the Secretary may direct, with such further conditions as the said Commissioner shall prescribe. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327.)

(c) Substitution. Every collector shall execute a new bond whenever required so to do by the Secretary, with such conditions as may be required by law or prescribed by the Commissioner, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the General Counsel for the Department of the Treasury. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; May 10, 1934, c. 277, Sec. 512 [b], [c], 48 Stat. 759.)

(d) Filing. Said bonds shall be transmitted to the Secretary and filed as he may direct. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; Mar. 2, 1895, c. 177, Sec. 5, 28 Stat. 807.)

tor. The bond is filed with him and all negotiations with reference to the taxes and the bond are with collector and no other, and the surety is justified in relying on his actions and representations.

We think what this Court said in *United States* v. *Alexander*, 110 U. S. 325, 328, is applicable and appropriate to be quoted here:

> "It may be fairly presumed that sureties take indemnity from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they are sureties and when their relation to their principals may have entirely changed, and their indemnity been surrendered, it is within the power of the Secretary of the Treasury without notice to them, to revive the bond and reimpose its obligation on them."

The presumption of law supports legality of collector's acts in terminating liability of the bond.

The presumption of law is that the Collector of Internal Revenue in terminating liability of the bond, acted legally and that his act is valid. *United States* v. *Chemical Foundation*, 294 F. 300, 326; *McCollum* v. *U. S.*, 17 ct. cl. 92; *S. Silberstein and Son* v. *U. S.*, 69 ct. cl. 373; *Davany* v. *Koon*, 45, Miss. 71; *Tainter* v. *Lucas*, 29 Wis. 375; *State ex rel.* v. *Prince*, 45 Wis. 610; See officers, Sec. 287, p. 1032, 46 C. J.

The government's acquiescence in the acts of collectors in accepting surety bond and terminating liability thereof, points persuasively to implied power in the collectors to do so.

The government has long recognized the practise of collectors in accepting and approving surety bonds, as is

evidenced by the many cases before the Courts,[3] and has acquiesced in their acts in rescinding and terminating liability of the bond and there is, no doubt, many cases of this kind not brought to attention. One of the acts of the collector in terminating liability of the bond and in which the government acquiesced, is that reported in *Hinemann Chemical Co.* v. *United States, supra*, which was decided adversely to the government and as heretofore stated, held that the collector was vested with implied power to terminate liability of the bond. This case was decided on the 27th day of September, 1937. The Government acquiesced in this decision and did not apply to this Court for a review. Another such case involving the act of the collector in terminating liability of the bond is that of *Brewerton* v. *United States, supra*, decided on the 14th day of January, 1935. The Government also acquiesced in this case and did not apply for a review. This action of the government persuasively points to implied power in the collector to terminate liability of a surety bond. On this point the Circuit Court of Appeals of Sixth Circuit said:

> "Acquiescence in officers' acts may persuasively point, in a doubtful case, to existence of power of the officer to forbid such acts, notwithstanding that such acquiescence does not confer such power on officers."
>
> "Acquiescence does not, of course, confer power, but it may, nevertheless, in a doubtful case point persuasively to its existence." *Royal Oak Drain District, Oakland County, Michigan*, v. *Keefe*, 87 F. (2d) 786, 793.

3. *United States* v. *Oswego Falls Corporation*, 113 F. (2d) 332; *United States* v. *Fidelity and Deposit Co. of Maryland*, 80 F. (2d) 24; *United States Concrete Conveyage Co.*, 42 F. (2d) 227; *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247; *Hinemann Chemical Co.* v. *United States*, 92 F. (2d) 302, 303, 304.

In the collection of taxes, the Collector of Internal Revenue is exclusive and supreme and is not a subordinate official of the government.

The Circuit Court of Appeals in its opinion, erroneously assumes that the Collector of Internal Revenue is a subordinate official of the government in the collection of taxes, as it fails to define his official position or status. It merely says: "It is well recognized that subordinate officials cannot surrender rights of the United States without expressed authority." Respectfully, this is an erroneous assumption. The Collector of Internal Revenue, in his sphere of collecting taxes is exclusive, superior, and supreme. He is made so by the statute solely conferring power and authority on him over the collection of the taxes. Section 1541 (a) 26 U. S. C. A., *supra*. No other person or officer of the government is vested with such power and, therefore, the collector has no superior, vested with power or authority to direct and control him in the performance of his duties in the collection of the taxes. This direction and control is the test as to whether he is a subordinate or superior officer.

State ex rel. Landis v. *Blake*, 110 Fla. 178, 181; 148 So. 566, 570;

People ex rel. Jacobus v. *Van Wyck*, 157, N. Y. 495, 506; 52 N. E. 559, 562;

Kane v. *Erie R. R. Co.*, 142 F. 682, 685, 73 C. C. A. 672;

In re Weaver, 131 N. Y. S. 144, 145; 72, Misc. 438.

In *State ex rel. Landis* v. *Blake, supra*, the Court said:

> "A subordinate officer is one who performs duties imposed on him under direction of a principal or superior officer * * *."

In *People ex rel. Jacobus* v. *Van Wyck, supra,* the Court said:

> "A subordinate official is one who performs the duties imposed on him under the direction of a principal or superior officer, or he may be an independent officer subject only to such directions as a statute lays on him, the compass of his duties is not determinate of classification, when the law imposed on him duties or requirements involving exercise of independent will, choice, or direction, beyond control of a superior, he ceases to be a subordinate officer * * *."

In *Kain* v. *Erie Railroad Co., supra,* the Court said:

> "Coming to the act, itself, the meaning of the first clause is plain. It states the Ohio Doctrine of superior and subordinate, every employee actually having authority to direct or control any other employee is not the fellow servant, but superior of such employee. To be such superior, it is not necessary that the employee shall have authority to direct or control more than one employee who is made his subordinate."

According to the Treasury Department, expressed authority is not granted to either the Commissioner of Internal Revenue or Collector of Internal Revenue to cancel and release liability of the bond and return it to the surety. G. C. M., 8980, Cum. Bull., X-1, p. 256. The way we construe this ruling, we believe the Department recognizes implied power vested in the commissioner and the collector to at least advise the surety that the bond has been satisfied for it says: "However, if the Bureau is satisfied that the taxpayer and/or the surety have paid the amounts of the tax and interest, and/or penalty covered by the bond in accordance with the terms of the extension granted, *the collector* or Bureau, may so advise

the surety." We contend that the foregoing is equivalent to a release or discharge of liability of the bond.

Since Collectors of Internal Revenue are vested with no expressed power to accept and approve surety bonds in the first instance, and since such bonds are held valid and enforcible, and since such collectors are vested with expressed or implied power in the performance of their duties; since it is held they are not vested with expressed power to accept and approve surety bonds, it is clear that they do so under their implied powers, derived from their broad, expressed, and exclusive powers to collect taxes.

It results, therefore, that the acceptance and approval of the bonds by the collectors are within the scope of their implied powers, and since they are valid and enforcible, it is therefore most logical that collectors are vested with implied power for all other purposes, including the recission and cancellation of the bond, in bringing the transaction once commenced, to a final conclusion, and surely no broader implied power is required for the collector to rescind a surety bond than to accept and approve such bonds in the beginning.

Exclusive expressed power is conferred on the Collector of Internal Revenue to collect taxes without direction of how the power is to be exercised. He is therefore vested with discretion in the execution of the power.

We think it is clear that the Collector of Internal Revenue is vested with a general grant of broad comprehensive powers over the collection of taxes, and in the execution and application of this power he is exclusive and supreme. It is also clear that the grant of power is unaccompanied by directions of how the power is to be exercised or the duties are to be performed, the words vesting the power are: "It shall be the duty of the collectors or their deputies, in their respective districts and they are authorized to collect all taxes imposed by law, how-

ever the same may be designated," *supra*. It is logical then, that the broad grant of power over the collection of all taxes without direction as to how the collection shall be made vests in the collector a broad discretion in the collection of the taxes and implies the right and duty in the collector to employ the means and methods necessary to comply with the expressed powers granted, and in the process of collection and execution of the power, includes the authority to accept a surety bond, stay collection, and cancel and discharge such liability of the bond.

On this point in *State* v. *Superior Court of King County*, 98, pp. 985, 990; the Court said:

> "The individuals holding these offices are required by law to perform certain definite governmental duties. It is a well recognized rule that a general grant of power or statutory direction to perform official duties unaccompanied by definite directions as to how the power is to be exercised or the duty performed, implys the right and duty to employ the means and method necessary to comply with the statutory requirements." Citing: 2 Lewis Sutherland Statutory Construction, 942, Sec. 508, Throop on Public Officers, 515, Sec. 545.

In *State* v. *Hildebrant*, 93 Oh. 1, 11, 12, it is said: "If the Constitution of the States commands a public officer to do a particular thing without directing the manner in which it shall be done, and the legislature has failed to pass facilitating legislation, it necessarily follows: that the officer required to perform this duty has implied authority to determine in the exercise of a fair and impartial discretion the manner and method of doing the thing commanded.

The United States Court of Claims in *Thompson* v. *U. S.*, 9 ct. cl. 187, 197, 198, said: "The distinction that should be made seems to be that where a statute ex-

pressly defines the powers, it is notice to the world, but where a statute confides discretion to an officer a party dealing with him in good faith may assume the discretion is properly exercised * * *."

In *American Stores Co.* v. *U. S.*, 68 ct. cl. 128, is somewhat similar to the case at Bar. The Act of July 11, 1919 (40 Stat. 85) vested a general grant of broad powers in the Secretary of War over the sale of surplus property in these words: "To sell surplus property upon such terms as may be deemed best.[4] The Court held that discretion was vested in the Secretary of War to adopt the means and methods in making the sale and this included cancellation of sales made, refunds, and adjustments, and held that he was a general agent with general powers and to sustain its position quoted from 2 C. J. 608, Sec. 243 as follows: "A general agent with full authority to represent the principal in a given locality, or to manage a particular branch of the principal's business, is more than a mere sales agent and where the conduct of his agency reasonably requires power to modify the contract he makes, Courts have often held the right so to do, to be within his implied powers." To the same point see also *Levy* v. *U. S.*, 63 ct. cl. 126; *U. S.* v. *West Point Grocery Co.*, 30 F. (2d) 941.

In *Levy* v. *U. S.*, *supra*, involved the same section of the Act as in *American Stores Co.* v. *U. S.*, *supra*, and the Court held: "That under the broad grant of power there was necessarily conferred upon local boards created in the War Department under the Secretary of War full and ample discretion in the mode and manner of handling the sales."

In *United States* v. *Corliss Steam Engine Company*, 91 U. S. 321, 322, 323, involved settlements of contracts made by the Secretary of the Navy for work performed,

4. Sale of War Supplies: "That the President be, and he hereby is authorized; through the head of any executive department, to sell, upon such terms, as the head of such department shall deem expedient to any person, partnership, association, corporation * * *." (40 Stat. 85) Act of July 11, 1919.

involving the Act of April 30, 1798 (1 Stat. 553),[5] conferring certain powers without direction as to how the power should be executed and the Court held that the Secretary was vested with implied power and discretion in executing the expressed power conferred and upheld a cancellation of a contract and settlement made with the contractor.

To the same point, see: *Great Falls Mfg. Co.* v. *Atty. Gen.*, 124 U. S. 581, 596, 597; *Maryland Steel Co.* v. *United States*, 235, U. S. 451, 459; *United States* v. *Mason and Hangar Co.*, 260, U. S. 323, 325; *Wells* v. *Nickles*, 104, U. S. 444; *Brooks* v. *U. S.*, 39, ct. cl. 494, 505; *Haynes* v. *Butler*, 30 Ark. 69; *Reliance Mfg. Co.* v. *Board of Prison Commissioners*, 161 Ky 135, 142; *State ex rel.* v. *Younkin*, 108 Kansas, 634, 638; *State ex rel. Bybee* v. *Hackmann*, 276 Mo. 110, 116; *State* v. *District Court*, 19 N. D. 819; 435, 835; *Kasik* v. *Janssen*, 158 Wis. 606, 609, 610; *City of Wilburton* v. *King Atty. Gen.*, 18 P. (2d) 1075, 1076; *Mayor etc. of N. Y.* v. *Sands*, 105 N. Y. 210, 217, 218, 219, 220.

Respectfully the opinion of the Circuit Court of Appeals is erroneous.

The Circuit Court of Appeals, below, held that, notwithstanding lack of expressed authority in the act that the collector was vested with implied power to accept the bond as follows: "He had implied authority to accept the bond," but no implied authority to terminate it, and for authorities to sustain its opinion on this point, cites: "*Hart* v. *United States*, 95 U. S. 316, respectfully we submit that this is not a case in point and not analogous to the fact situation of the case at Bar, or to the statute involved."

5. The Act of April 30, 1798 (1 Stat. 553) provided: "That there shall be an executive department under the denomination of the Department of the Navy, chief officer of which shall be called the Secretary of the Navy, whose duty it shall be to execute such orders as shall be received from the President of the United States, relative to the procurement of Naval stores and materials and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval establishment of the United States * * *."

The statute involved in the *Hart* case expressly prohibited the removal of distilled spirits from a distillery warehouse before the payment of the tax,[6] and plainly, there could be no inference or suggestion of implied power or discretion in the government officer to permit its removal without payment of the tax and for violation of the act, heavy penalties were provided involving acts of omission and commission,[7] and of course under no circumstances, could the question of implied power arise, as in the instant case.

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6. 15 Stat. 130, Sec. 15, provided: "And be it further enacted, that every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits, of his own manufacture; but no dwelling house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the Collector of the district, and in charge of an Internal Revenue storekeeper assigned thereto by the Commissioner of Internal Revenue; *and the tax on the spirits stored in such warehouse shall be paid before removal from such warehouse.*"

7. 15 Stat. 140, Sect. 36, provided: "And be it further enacted, that all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States; and in any case of the seizure of any distilled spirits found elsewhere than in a distillery, distillery warehouse, or other warehouse for distilled spirits authorized by law, or in the store or place of business of a rectifier or of a wholesale liquor dealer, or of a compounder of liquors, or in transit from any one of said places; and in case of the seizure of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which shall not have been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or the storekeeper, wholesale dealer, rectifier, or compounder, have not been made at the time or in the manner required, or in respect to which the owner or persons *having possession, control, or charge of said spirits shall have omitted to do any act required to be done or shall have done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant* of said spirits to show that no fraud has been committed, and that all the requirements of law in relation to the payment of the tax has been complied with and any person who shall remove or shall aid or abet in the removal of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law, or who shall conceal or aid in concealment of any spirits so removed, or who shall remove or shall aid or abet in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law; or who shall conceal or aid in concealment of any spirits so removed shall be liable to a penalty double the tax imposed on such distilled spirits so removed or concealed and shall on conviction be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

The statute in this case is not one conferring broad powers without direction in executing the power as in the case at bar, but is a statute conferring power with complete direction as to its execution. Compare them.

The case of the *United States* v. *Globe Indemnity Co.*, 94 F. (2d) 576, respectfully does not support the Circuit Court of Appeals in its opinion, because if the petitioner is correct in the argument made and position taken in the case at Bar then this case is governed by the same argument and same authority, because the same statute granting power to the collector to collect taxes was also involved in this case, that is Section 1541 (a) 26 U. S. C. A., *supra*. The Second Circuit Court of Appeals said that it was distinguishable from the *Hinemann Chemical Co.* case.[8] It is distinguishable on the facts, because in the *Hinemann Chemical Co.* case there was a definite act of the collector in recission of the bond, while in the *Globe Indemnity Co.* case, there was no definite act of the collector in rescinding the bond and returning it to the surety. The only act of the collector involved, is that of making a tax search and the Second Circuit Court of Appeals said that he was not required to do so under the law. It is, therefore, not a case in point.

Ritter v. *United States*, 3 Cir., 28 F. (2d) 265, 267, respectfully is not a case in point. This case involved a field auditor of the government who without either expressed or implied authority and clearly contrary to the directions in the statute, advised a taxpayer that it was not necessary to file a formal claim for a refund with the Commissioner of Internal Revenue to recover an overassessment of taxes paid. The sections of the statutes in-

8. "The decision in *United States* v. *Hinemann Chemical Co.*, 3 Cir., 92 F. (2d), 302, holding that a collector had authority to release a bond given to stay execution and accept a new one, does not govern the present situation. It may be that an official having authority to take a bond can accept another in substitution for it and release the earlier obligation. * * * The right to bind the commissioner by a tax search which a collector furnishes is a different matter."

volved in this case are quoted below.[9] This case, therefore, did not involve a statute granting broad powers to an officer without direction in the execution of those powers as is involved in the case at Bar, but involves the invalid act of an auditor of the government which was plainly contrary to the expressed provisions of the statute and the question of implied power or discretion vested in him to do so, did not and could not arise.

The Circuit Court of Appeals, below, discusses the cases of *Brewerton* v. *United States* and *Hinemann Chemical Co.* v. *United States, supra,* and intimates that they are valueless as authorities in supporting the contention of the petitioner that implied authority and discretion was vested in the Collector of Internal Revenue to rescind the bond, because the Circuit Court of Appeals of the Third Circuit in the *Hinemann Chemical Co.* case and the United States Court of Claims in the *Brewerton* case had mistakenly applied *United States* v. *Alexander*, 110 U. S. 325, as an authority.

The doctrine of implied authority and discretion in a government officer was not involved in the *Alexander* case. The authority of the Secretary of the Treasury involved in that case was expressed in the statute, both as to the power granted and direction in the exercise of the power in that it expressly authorized him not only to decide the case but to rescind and cancel the bond and, therefore, is not analogous to the case at Bar on the facts or with

9. Section 1113 (26 U. S. C. A., Sec. 156) provides: "That no suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive, until a claim for refund has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulation of the Secretary of the Treasury established in pursuance thereof."

Section 1112 of the Revenue Act of 1926 (26 U. S. C. A., 157) provides: "That all claims for the refund of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or any sum alleged to have been excessive, or in any manner wrongfully collected, must, * * * be presented to the Commissioner of Internal Revenue within four years after the payment of such tax."

reference to the act involved, conferring broad powers in the collector over the collection of the taxes. Petitioner contends that it makes no difference whether or not *United States* v. *Alexander, supra,* was misapplied as an authority, because the proper construction of the statute conferred power on the collector over the collection of the taxes, grants the collector by implication broad powers and discretion in the execution of the power conferred, which was not involved in the *Alexander* case, however, it is clear that the Circuit Court of Appeals in the *Hinemann Chemical Co.* case and United States Court of Claims in the *Brewerton* case grounded their decision mainly upon the provisions of the Revised Statutes, Section 3183 and Section 1541 (a) 26 U. S. C. A., *supra.* See quotation from the cases, pp. 7-9, *ante.*

The Circuit Court of Appeals refers to and discusses the question of compromise. Most respectfully, we submit that this point is not involved in the case at Bar and can have no effect in determining the sole question presented, the implied power and discretion vested in the collector to terminate liability of the bond. If this Court determines that the collector in the exercise of implied power and discretion discharged the liability of the bond then the question of compromise falls by the way, and if the Court should hold that the collector was without implied power and discretion to discharge liability of the bond, again the question of compromise would fall by the way. Therefore, it cannot have any effect on the ultimate decision to be made and is clearly beside the point.

Therefore, the expressed, exclusive supreme power vested in the collector over the collection of the taxes without direction of how the power shall be exercised, impliedly vests in him the additional power and discretion necessary for the due and efficient exercise of the powers expressly granted and this includes implied power

and discretion to accept a surety bond and discharge liability thereof and this power is fairly implied from the grant of expressed power conferred.

See *County of Wilson* v. *National Bank*, 103 U. S. 770, 778; *Dooley* v. *Pennsylvania Railroad Co.*, 250 F. 142, 143, and the implied power of the statute is much a part of it as that which is expressed.

POINT II.

Interest.

Points 2 and 3 made in the summary of the argument will be treated together.

The interest claimed by respondent is that provided by New York General Business Law, Consol. Laws, c. 20, Sec. 370,[10] as damages for breach of contract. This interest, it is clear, is not provided for in the bond (See bond Exhibit "B" to Stipulation of Facts, R., 16) and therefore not a part of the contract and cannot be recovered as such, and if recoverable at all, it is by way of damages for the detention of money after it is due.

Interest is the compensation allowed by law, or fixed by the parties for the use or forbearance of money, *or as damages for its detention. Loudon* v. *Shelby County Taxing District*, 104 U. S. 771, 774; *New Orleans Ins. Association* v. *Piaggio*, 16 Wall. 378, 386; *Hiatt* v. *Brown*, 15 Wall. 177, 185, 186.

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10. Section 370. New York Gen. Bus. Law.

"The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year; and at the rate for a greater or less sum, or for a longer or shorter time."

The New York Courts in construing this statute have held: that interest is only allowed when there is a contract, express or implied to pay interest, or as damages for the non-payment of money due. *Matter of New York, etc., Bridge*, 137 N. Y. 95. Claims unliquidated do carry interest. *Sloan* v. *Baird*, 162 N. Y. 327. Interest may be waived by acceptance of principal; *McCreery* v. *Day*, 119 N. Y. 1; *Cutter* v. *New York*, 92 N. Y. 166.

The law allows interest only on the ground of a contract, express or implied for its payment, *or as damages for the detention of money*, or for the breach of some contract, or the violation of some duty. *Morley* v. *Lake Shore, etc. R. Co.*, 146 U. S. 162, 168; *New York Trust Co.* v. *Detroit, etc. R. Co.*, 251 F. 514; *Herman H. Hettler Lumber Co.* v. *Olds*, 242 F. 456, 459.

The undisputed facts of the case at Bar discloses that respondent is guilty of gross laches in asserting, instituting suit, and prosecuting its claim to recover such interest. It was approximately nine years after the accrual of the right to claim interest as damages, December 17, 1926, the date of the settlement of the liability of the bond and December 20, 1926, the date of the cancellation of the bond before respondent instituted suit to recover the interest, April 27, 1935. (See date of complaint, R., 7-8, date of cancellation of bond, R., 13-14). Since the interest, if recoverable at all, must be recovered as damages, the law is well settled that respondent is not entitled to recover because of laches in asserting and prosecuting its claim.

The rule is, there can be no recovery for damages, interest, which might have been prevented by reasonable and diligent efforts on the part of respondent in promptly asserting and prosecuting its claim. *Warren* v. *Stoddard*, 105, U. S. 224, 229; *Wicker* v. *Hoppock*, 6 Wall. 94; *Western Real Estates Trustees* v. *Hughes*, 172 F. 206, 211; *Lillard* v. *Kentucky Distillers and Warehouse Co.*, 134 F. 168, 178.

In the case at Bar, the respondent has delayed for a period of nine years after the accrual of the right of action to recover interest, without any excuse, just, or otherwise, before prosecuting claim for interest, and almost eighteen years after the taxes were due. The law is well settled that where such interest is claimed as damages the laches of respondent is a bar to recovery.

U. S. v. *Sanborn*, 135 U. S. 271, 281, 282; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *Redfield* v *Bartels*, 139 U. S. 694; *Mason* v. *Walkowich*, 150 F. 699, 700, 706; *Jouralmon* v. *Ewing*, 80 F. 604, 607, 608; *Stewart* v. *Schell*, 31 F. 65, 66; *Mitchell* v. *Kelsey*, F. Cas. No. 9, 664. The same rule has been held by this Court to apply to the United States, *U. S.* v. *Sanborn, supra.*

The basis for the bar to recover interest is grounded in damages and because of the laches of the party claiming it to assert and enforce his rights thereto and not at all on the merits or demerits of the principal claim which it appears the Circuit Court of Appeals thought.

The cancellation and return of the bond to the surety does not surrender the rights of the government against the taxpayer, principal on the bond for the taxes and interest due, nor the collector from the obligations of his bond which he has given for the protection of the government, and the faithful and diligent performance of his duties, unless such actions on account of the long delay and laches of the respondent are barred by the Statute of Limitations.

There is no statute of limitation applicable to the action of the case at Bar in so far as petitioner has been able to ascertain after a careful research. However, there is Statutes of Limitations as a bar to recovery of taxes, refunds, interest, and many other actions,[11] both for and against the government, and following the policy of the statute of limitations to bring all transactions and right

11. Limitation to bring actions against the United States in U. S. Courts and Court of Claims is generally six years. Section 41 (20) (Judicial Code, Section 24 Amended), Section 262, Title 28, Code Laws, U. S. 1934 Ed.

Limitation of actions against sureties in certain cases is five years. Section 5, Title 6, Code Laws, U. S. 1934 Ed.

Limitation actions, U. S. Court of Claims, generally six years. Section 262, Title 28, Code of Laws, U. S. 1934 Ed.

Limitation on assessment of Internal Revenue tax, four years. Proceedings in Court to collect tax, five years. Section 1432 (a), Title 26, Code of Laws, U. S. 1934 Ed.

Limitation on estate tax, three years, suits in Court, three years. Section 474, Title 26, Code of Laws, U. S. 1934.

of actions thereon to a close, there should be a limitation to the action of the case at Bar. The equities of the instant case should be considered in the light of all these circumstances.

The judgment of the Second Circuit Court of Appeals, below, should be reversed, and the cause remanded to the District Court for the Southern District of New York, with instructions to dismiss the complaint with judgment against respondent for costs sustained in the cause.

Respectfully submitted,

HARRY S. HALL,
Counsel for Petitioner.

NATHANIEL E. WHEELER,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 817.

ROYAL INDEMNITY COMPANY,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER.

HARRY S. HALL,
Counsel for Petitioner.

NATHANIEL E. WHEELER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER.

There is a typographical error on page 2 of Petitioner's Main Brief wherein it is stated certiorari was granted March 7. This should be corrected to read April 7.

The facts stated under subhead of "Statement of the Case," on pages 2 and 3 of Petitioner's Main Brief are correct, but some of the citations to number of the pages are incorrect. This results, because they refer correctly to the

number of the pages of the certified copy of the record furnished by the Circuit Court of Appeals, instead of the printed record reprinted since certiorari was granted the number of the pages being reduced and changed. Since there is substantially no difference between the Statement of Fact in Petitioner's and Respondent's briefs there will result little, if any confusion. On page 15 of Petitioner's brief appears another error after the word county following figures 98, should be corrected by eliminating "PP" and in lieu "P" (for Pacific).

The authorities, *Erskine v. Hohnbach*, 14 Wall. 613, 616; *Harding* v. *Woodcock*, 137 N. S. 43, 46; *Tait* v. *Western Md. Ry. Co.*, 289 N. S. 620, 627; *Moore Ice Cream Co.* v. *Rose*, 289 N. S. 373, 380-381, cited on page 7 of Respondent's brief, respectfully are not in point with the fact situation of the case at bar. No surety bond was involved in those cases as here. The court, among other things, said the collector was without power to revise the assessment certified to him and must proceed to collect the tax and in the first two cases held he was protected as against an action of trespass. The last two cases cited were suits against the collector by taxpayers to recover refund of taxes paid and did not involve a surety bond. In the case at bar the collector did not undertake to revise or change the amount of the assessment certified and did not refuse to proceed to collect the tax as against the taxpayer. In the case at bar in the process of collecting the tax and discharging his duty the collector accepted a surety bond and merely suspended collection of the tax and finally released liability of the bond, but not the tax. It remains unrevised and could still be enforced as against the taxpayer. It is plain that Sections 3183 and 321 of the Revised Statutes grant certain powers without direction as to how the power shall be executed. Therefore in the process of collection impliedly the collector could accept a surety bond and release liability thereof. Even granting that the commissioner under a proper construction of the statutes was vested with power of supervision over the

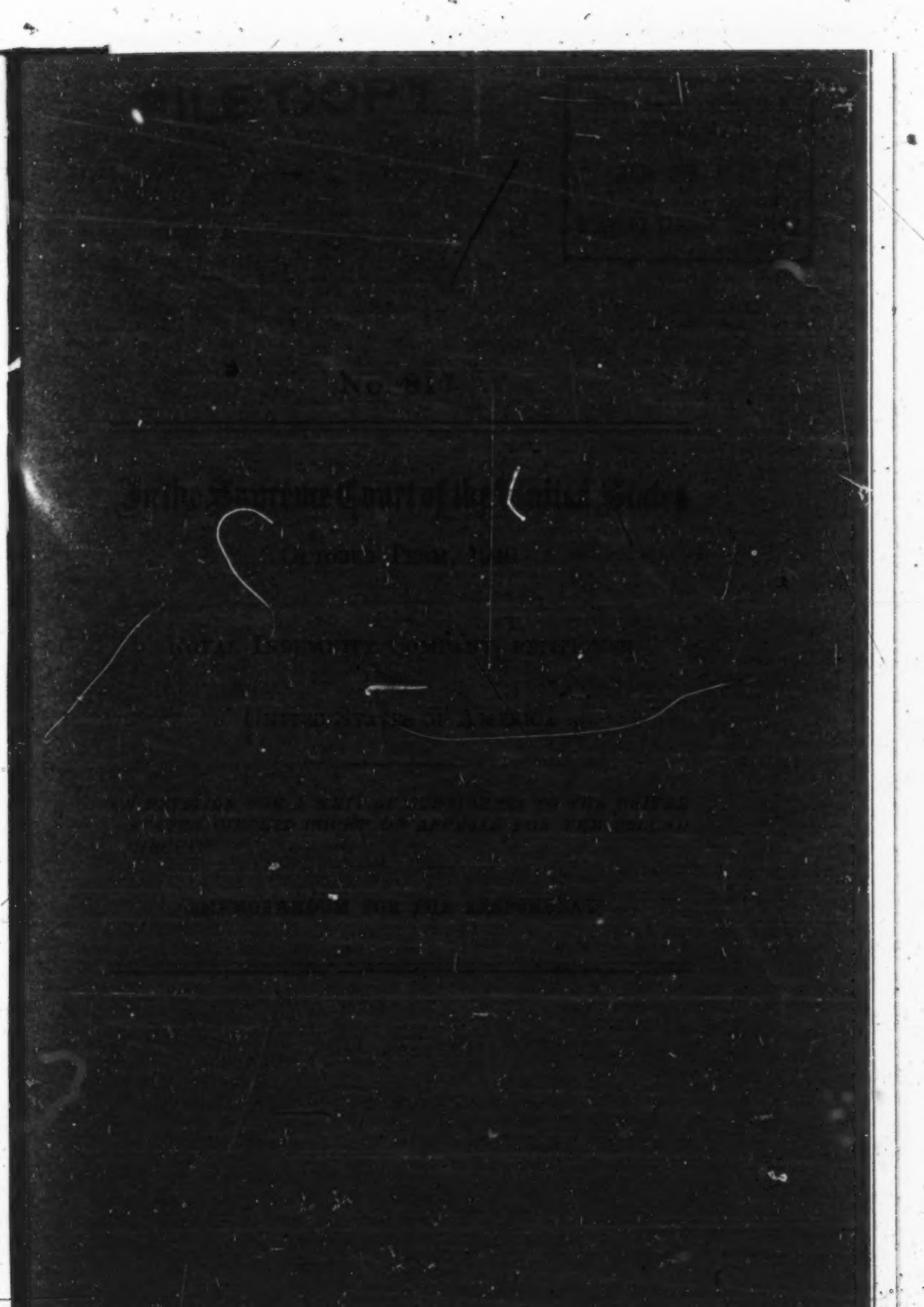
collection of taxes in the exercise of the power the commissioner and the government, if not directing and consenting thereto had at least acquiesced in the acts of the collector in accepting surety bonds, suspending collection and discharging sureties from liability thereof in the process of collection of taxes. (See pp. 10 and 11, and footnote 3, Petitioner's Main Brief.)

Respectfully submitted,

HARRY S. HALL,
Counsel for Petitioner.

NATHANIEL E. WHEELER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 817

ROYAL INDEMNITY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Government does not oppose the issuance of a writ in this case, but suggests that, if granted, it be limited to the first question presented in the petition.

1. The first question presented is whether a Collector of Internal Revenue has implied authority to release a surety bond. The court below answered this question in the negative, basing its decision upon the principle that subordinate officials cannot surrender rights of the United States without express statutory or constitutional authority. Al-

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though we believe this decision to be plainly correct, it is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Heinemann Chemical Co.* v. *United States,* 92 F. (2d) 302, with which the court below stated it was unable to agree.

2. The other questions presented in the petition relate to the action of the court below in awarding to the United States interest at six per cent upon its claim against the surety, pursuant to the provisions of New York law. The decision of the court below in this respect is not in conflict with any decision of this Court or of any other Circuit Court of Appeals, and is fully supported by the authorities cited in the opinion.

United States v. *Wagner,* 93 F. (2d) 77 (C. C. A. 9th), upon which the petitioner relies, is not opposed. That case involved the interpretation of a provision of a statutory surety bond, one of the conditions of which was that the principal obligor would pay "the deficiency as finally determined, together with any interest * * * provided for by law." The court held that "The law by which such interest is 'provided for' is the law of the United States". That holding is, of course, in no way opposed to the decision below that a surety who is adjudged liable for breach of contract must pay interest, as provided by state law, from the date of the breach to the date of judgment.

The authorities cited by the petitioner (Pet. 7, 13) to the effect that the allowance of legal interest may, in certain circumstances, be refused where the plaintiff is guilty of laches are all plainly distinguishable on their facts from the situation disclosed by the present record.

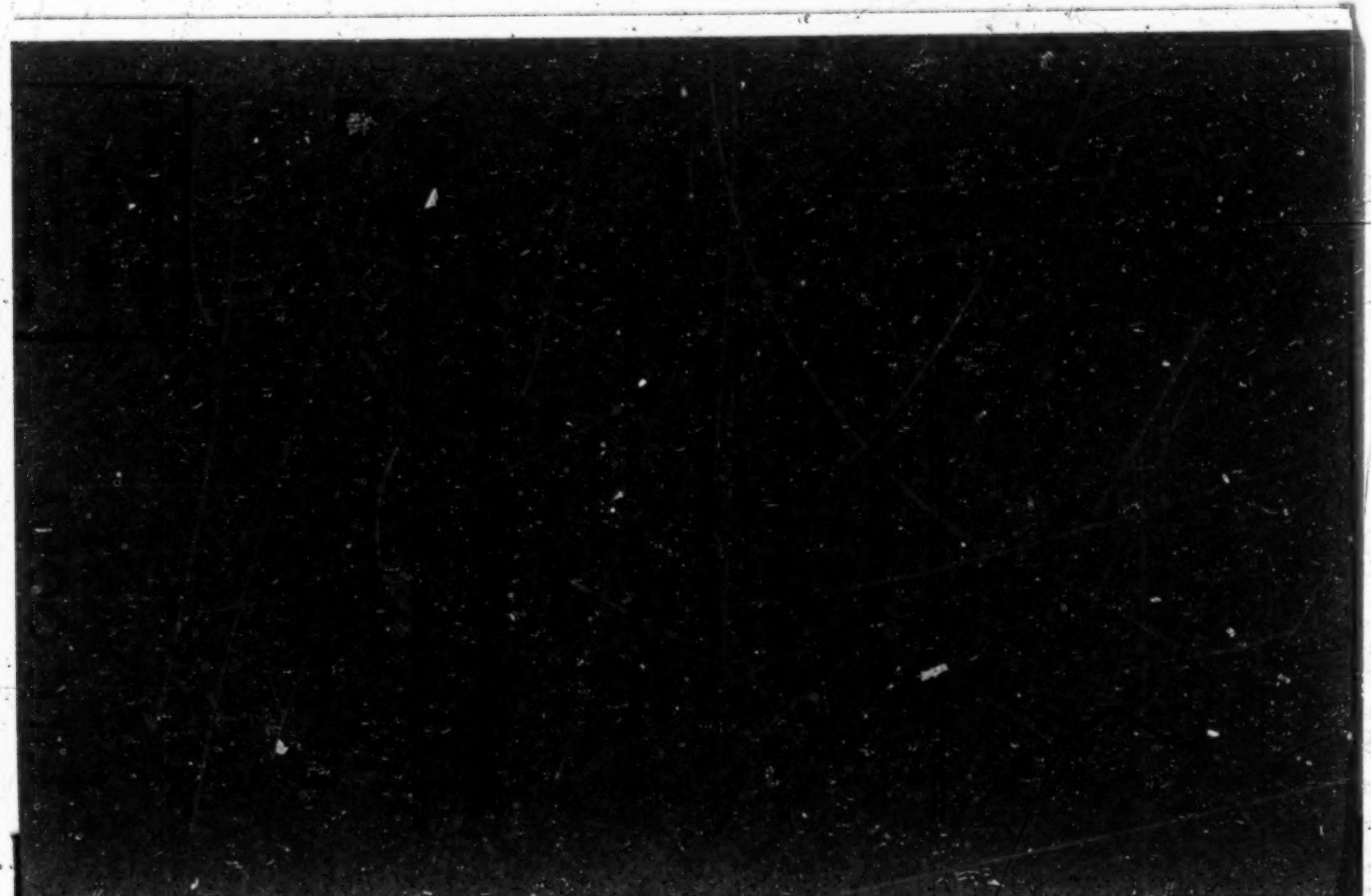
Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 817

THE ROYAL INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 12) is unreported. The opinion of the Circuit Court of Appeals (R. 17) is reported in 116 F. (2d) 247.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 26, 1940. (R. 20.) The petition for a writ of certiorari was filed on March 6, 1941 (R. 21), and granted on April 7, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Collector of Internal Revenue has authority to discharge a surety bond filed with a claim in abatement when the liability of the taxpayer and surety has not been completely satisfied.

2. Whether the United States is entitled to interest on its claim against the surety.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 29–33.

STATEMENT

The pleadings (R. 2–7) and the stipulation of facts (R. 7–10C) disclose the following undisputed facts:

On March 15, 1920, the Commissioner of Internal Revenue assessed to the taxpayer, Walter Moore, additional income tax for the calendar year 1917 in the amount of $29,128.82. (R. 7.) On May 6, 1920, the Collector of Internal Revenue for the Second District of New York served notice and demand on the taxpayer for payment of the additional tax. Thereupon the taxpayer filed a claim in abatement, and on December 1, 1920, the taxpayer as principal and the petitioner as surety executed a bond to the Collector, and to his successor in office in the amount of $31,000 to secure payment of the tax, interest and any penalties. (R. 8, 10A.) On May 2, 1922, the taxpayer and

the surety, at the then Collector's request, executed a second similar bond in the sum of $38,000, which superseded the first bond. (R. 8, 10B.) Upon the filing of the bonds the Collector continued to suspend the collection of the additional assessment and interest while the Commissioner considered the claim for abatement. On February 18, 1925, the Commissioner allowed the claim in abatement to the extent of $20,906.15, and rejected the claim in the amount of $8,223.67, thereby determining the latter amount to be due and properly assessed. (R. 8.)

Upon the taxpayer's failure to pay, the Collector on August 5, 1926, made demand upon the surety for the amount for which the abatement claim was rejected, with interest, aggregating $14,555.89. The petitioner disputed liability in that amount and submitted to the Collector a draft to the order of the Collector for $8,223.67. (R. 9.) The draft, which was paid upon presentation, bore a notation upon its face as follows (R. 10C):

> In full settlement of all taxes assessed for the period of the calendar year 1917 and in full settlement of all liability under bond SX 81670, Walter Moore principal

On December 20, 1926, the Collector returned the bond for $38,000 to the surety with the statement that all liability under the bond was terminated. (R. 9.)

On September 20, 1932, the then Collector made demand upon the taxpayer for $4,119.98 of interest

on the additional income tax for 1917. The demand was returned "not found", and on September 23, 1932, the Collector made demand upon the surety for that amount. (R. 10.)

The surety refused to pay any amount (R. 10), and this action was thereafter commenced by the United States on April 27, 1935, against the surety (R. 1).

From the facts recited in the stipulation of facts the sum sued for may be computed as follows:

Unabated portion of the tax	$8,223.67
Interest at 6% per annum from May 6, 1920 (date of original demand on taxpayer) to February 18, 1925 (date claim in abatement rejected in part)	2,363.01
Interest from February 18, 1925 to December 17, 1926 (date of payment) at 12% per annum	1,806.06
Total	12,392.74
Amount paid	8,223.67
Balance paid	[1] $4,169.07

Both parties, on January 30, 1940, moved for summary judgment upon the complaint, answer and a stipulation of facts annexed to the Government's notice of motion. (R. 1, 11–12.)

The surety did not dispute that accrued interest on the tax, correctly computed to December 17, 1926, the day the surety paid the principal amount of the tax, was $4,169.07. The District Court gave the United States a judgment for that sum, but

[1] The computation of the larger sum of $4,932.86 in the complaint (R. 5) was made by applying an interest rate of 12% per annum for the period from May 6, 1920, to November 22, 1921, the day before enactment of the Revenue Act of 1921 which provided in Section 250 (e) (h) an interest rate of 6% per annum for taxes assessed under the 1917 and 1918 Revenue Acts. The amount of $4,119.98 demanded by the collector on September 23, 1932 (R. 10) apparently involved an erroneous computation.

refused to give interest at the legal rate of 6% per annum on the amount of $4,169.07. (R. 12–13.) Cross-appeals were taken (R. 15), and the Circuit Court of Appeals held that on the surety's appeal the judgment should be affirmed, and that on the appeal of the United States it should be modified to include interest at the rate of 6% per annum from December 17, 1926 (R. 20).

SUMMARY OF ARGUMENT

I

It is undisputed that the Collector had no express authority to cancel the bond and reliance is placed on implied authority. Both the limited function of collectors in respect of abatement claims and the applicable principle of law disclose the lack of any implied authority.

An examination of the statutes and regulations governing abatement claims, and security given therewith, discloses that the Commissioner alone had authority to determine such claims and that there was a consistent policy of requiring security for the tax pending the determination in all cases. Bonds given as security, although nominally running to the collector, were intended to protect the Government which obtained direct rights under them as the real party in interest. Nothing in the statutes, regulations, or administrative practice implies authority in the collector to release such rights of the United States.

Under our legal system all authority to bind the Government must be found in the Constitution or statutes. Public policy places any occasional loss on the individual who relies on unauthorized acts rather than on the public. Particularly in the case of subordinate officials, such as collectors, authority to release obligations of the United States should not be implied in the absence of a clear statutory basis which is not present here.

II

Interest at the legal rate of 6% per annum should have been allowed on $4,169.07 from December 17, 1926, when that sum was due under the bond, but unpaid.

A. Interest is due as a matter of law under the rule that sureties are liable for interest on amounts due on their bonds from the time they are notified and fail to pay. This is not a case of interest on interest, as the District Court thought, because the amount recovered on the bond is not recovered as interest on the tax but as a sum due on the obligation of the bond which is recognized to be distinct from the obligation of the tax.

B. Interest due as a matter of law should not be denied on the basis of equities of a particular case. Moreover, there are no such equities here. The surety had no right to contest the tax and it patently violated the terms of its bond in paying a sum less than was due. It is charged with knowledge that the Collector had no power to ac-

cept the payment in compromise or to discharge the Government's obligation on the bond.

ARGUMENT

I

THE COLLECTOR HAD NO AUTHORITY TO CANCEL THE BONDS AND THE UNITED STATES IS NOT BOUND BY HIS UNAUTHORIZED ACTS IN THAT RESPECT

The present proceeding was instituted by the United States against the petitioner on a bond, upon which the petitioner was surety, given to a Collector of Internal Revenue to secure the payment of income taxes, interest and penalties for the year 1917, pending consideration by the Commissioner of Internal Revenue of a claim in abatement. The Commissioner rejected the claim in abatement in part, and upon the taxpayer's failure to pay, demand was made on August 5, 1926, upon the petitioner for the amount for which the abatement claim was rejected, with interest. The petitioner paid only a portion of the sum demanded of it, but noted on the draft that the payment was in full settlement of all liability under the bond. The Collector of Internal Revenue thereafter returned the bond to the petitioner with the statement that all liability under the bond was terminated.

The authority of the Collector of Internal Revenue to accept the bond here in suit, and the right of the United States to sue upon the bond, are not questioned by the petitioner. The petitioner

also does not contest the fact that the sum of $4,169.07, here involved, was included in the amount demanded of it on August 5, 1926, and that it was then under an obligation to pay that sum to the United States and would still be under such obligation save for the action of the Collector on December 20, 1926, informing it that all liability under the bond was terminated. The principal question in the present case, therefore, is whether the statement of the Collector that all liability under the bond was terminated bars a recovery by the United States upon the bond. That question was determined adversely to the petitioner by the District Court and the Circuit Court of Appeals.

The petitioner's contention is that the authority of the Collector of Internal Revenue with respect to the collection of taxes is exclusive and supreme, that the Collector is not a subordinate official of the Government, and that since the Collector has implied authority to accept a bond, he is likewise invested with implied authority to discharge a surety from liability on a bond. The petitioner tacitly concedes that if a collector has no authority to discharge a surety, the United States would not be bound by any attempted exercise of such a power. The Government contends that the Collector lacked authority to discharge the bond involved here, and that his action in stating that the liability on the bond was

terminated was without legal effect upon the rights of the Government.

The Government submits that the Collector's complete lack of authority to discharge the bond is disclosed by an examination of the nature and scope of his functions generally and in respect of abatement claims.

It was the duty of the Collectors to collect all taxes imposed by law. Revised Statutes, Section 3183, *infra*, p. 30. However, general superintendence of the collection as well as the assessment of all taxes was by law vested in the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury. Revised Statutes, Section 321, *infra*, p. 29. Collectors are merely subordinate officers of the Treasury Department, and their functions are primarily ministerial. *Erskine* v. *Hohnbach*, 14 Wall. 613, 616; *Harding* v. *Woodcock*, 137 U. S. 43, 46; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 627; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 380–381.

Section 250 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, in effect when the additional assessment for 1917 here involved was made in 1920, provided that if upon the Commissioner's examination of an income tax return the amount paid was insufficient, the difference should be paid on notice and demand by the Collector. The Commissioner made the additional assessment and advised the Collector, who then demanded payment within ten days. To avoid undue hardship, tax-

payers were allowed to file claims in abatement and delay collection until the Commissioner determined their claims. H. Rep. No. 2, 70th Cong., 1st Sess., p. 34 (1939–1 Cum. Bull. (Part 2) 384, conveniently quoted in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 418–419).

Section 3220 of the Revised Statutes, as amended by Section 1316 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, *infra*, p. 31, authorized the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, to remit taxes erroneously assessed. "Remit" includes "abate". *Sugar Run Coal Mining Co.* v. *United States*, 21 F. Supp. 10, 11 (E. D. Pa.). Section 250 (e) of the 1918 Act recognized the existence of the claim in abatement practice by the provision that if an overdue tax was the subject of a bona fide claim in abatement, the 6% rate of interest applied rather than the 12% rate, and the 5% addition to the tax. Section 234 (a) (14) (a) expressly provided for a claim in abatement with a surety bond satisfactory to the Commissioner in special cases where the taxpayer had suffered a substantial loss in value of inventory or by rebates. *United States* v. *John Barth Co.*, 279 U. S. 370. Section 250 (g) provided that the Commissioner might accept security approved by him to suspend collection of jeopardy assessments.

Treasury Regulations under the 1918 Act (Treasury Regulations 45, Article 1032; see also Treasury Regulations 14 (Revised), p. 14) regulated this

general practice of claims in abatement by providing the manner in which they should be prepared and submitted for the Commissioner's consideration. These regulations further provided that filing a claim in abatement did not suspend collection or relieve the collector from the duty of preventing collection being jeopardized. Article 268 of Treasury Regulations 45 made provision for handling surety bonds filed with statutory claims in abatement under Section 234 (a) (14) (a) of the 1918 Act, but apparently there was no specific provision for bonds filed with other abatement claims not provided for by specific statutory provisions but filed under authority of the general provisions (Revised Statutes, Section 3220 as amended), and the regulations and administrative practice.

Even in the absence of a specific statutory provision expressly authorizing abatement claims in all types of cases, these statutory provisions and the authorized regulations, which have the effect of statutory law, constituted legislative authorization or approval of the generally accepted claim in abatement procedure. *United States* v. *Wolper,* 86 F. (2d) 715 (C. C. A. 2d); *United States* v. *Converse Cooperage Co.,* 42 F. (2d) 227, 228 (N. D. Ill.). See also *Rock Island &c. R. R.* v. *United States,* 254 U. S. 141.[2]

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[2] Section 250 (a) and (f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, in effect recognized and ratified the general abatement claim practice by changing it to the extent of pro-

An integral feature of the abatement claim procedure, as disclosed by all of the provisions with respect to abatement claims discussed above, was the requirement of surety bonds or other security to secure payment of the taxes pending suspension of collection until determination of the abatement claims. Such bonds were given "to protect the United States against loss", and were "intended to guarantee payment * * *". *Gulf States Steel Co.* v. *United States*, 287 U. S. 32, 43; *United States* v. *John Barth Co.*, 279 U. S. 370; *United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322, 325 (C. C. A. 2d).

The Commissioner alone had authority to pass on abatement claims. The collectors had no authority in respect of them and merely exercised the ministerial duty of transmitting them to the Commissioner. In requiring security with these claims the collector's role was much the same. He merely carried out the policy that the Government should be protected against loss and collection should be secured pending the Commissioner's determination. Cf. O. D. 733, 3 Cum. Bull. 308 (1920), instructing collectors that where the prop-

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viding a hearing in the Bureau before an additional assessment and forbidding an abatement claim after determination upon such a hearing. See S. Rep. No. 275, 67th Cong., 1st Sess., pp. 20–21 (1939–1 Cum. Bull. (Part 2) 181). The Revenue Act of 1924, c. 234, 43 Stat. 253, which provided for determination of tax liability by the Board of Tax Appeals before additional assessment, under Section 279 (d) forbade claims in abatement except in jeopardy cases.

erty of a corporation is in the hands of a receiver who files a claim for abatement of an additional assessment of income and profits taxes for 1917, no bond should be required as security for the payment of such taxes, inasmuch as the Government was entitled to receive payment of the taxes in preference to the creditors of the corporation. See also I. T. 1869, II–2 Cum. Bull. 244 (1923), instructing collectors that where the taxpayer fails to furnish the bond requested upon the filing of an abatement claim and the collector proceeds to collect the tax as if no claim for abatement had been filed, he should return the abatement claim to the taxpayer and advise him of his remedy by a claim for refund.

The administrative policy and practice of the Bureau of Internal Revenue is further indicated by its ruling that a bond to secure an extension of time to pay the tax (in that case under Section 274 (k) of the Revenue Act of 1926, c. 27, 44 Stat. 9) cannot be returned and the surety released even where it has paid all the taxes and interest then requested, because there is no provision of law authorizing such release. G. C. M. 8980, X–1 Cum. Bull. 256 (1931).[3] This departmental rul-

[3] This ruling states in its pertinent part:

This office is of the opinion that, even where payments by a principal or a surety satisfy the liability under a bond, there is no provision of law authorizing the Commissioner or a collector to return the bond or to issue to a principal or surety a certificate of release therefrom, and that, accord-

ing relied on a series of opinions of the Attorney General expressing the long and consistently held view of the executive branch of the Government that, in the absence of statutory authority, there is no power to release a bond even where another is substituted. 33 Op. A. G. 441; 7 *id.* 62; 4 *id.* 312.

Theoretically, it might be suggested that collectors required bonds with abatement claims only in those cases where on the facts they thought collection jeopardized and in order to protect themselves from liability on their official bonds for failure to collect. It might be argued that in this manner collectors exercised independent discretion and authority in requiring bonds, and that such authority sufficiently implies authority to cancel such bonds. It is sufficient answer that in every case where the statute expressly provides for abatement claims, it expressly requires security in every case without regard for the taxpayer's solvency. This expressed statutory policy was also observed in practice even in cases of

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ingly, there is no authority for the execution of the form submitted by the surety in the instant case, purporting to release the surety from further liability under the bond furnished by it. (See 4 Op. Atty. Gen., 312; 7 Op. Atty. Gen., 62; 33 Op. Atty. Gen., 441.) The bond, therefore, should be retained in the files of the Bureau. However, if the Bureau is satisfied that the taxpayer and/or the surety in this case have paid the amounts of the tax and interest and/or penalty covered by the bond, in accordance with the terms of the extension granted, the collector or the Bureau may so advise the surety.

abatement claims not specifically mentioned in the statute. Thus the policy of protecting the Government against loss was observed by requiring security with all abatement claims.

But even if it were thought that the unlikely possibility of the Government asserting liability on his official bond was one important consideration in moving the collector, in his discretion, to require bonds with abatement claims, and was not merely collateral and incidental, certainly the principal purpose of such bonds was to protect the United States directly by giving it an action on the bonds and was not merely to give the collector a remedy if he were liable on his official bond. Indeed, it is settled, although corporate sureties contended to the contrary, that the United States obtained direct rights under these bonds, given nominally to collectors, and is the real party in interest and can sue upon them in its own name.[4] The making of the bond gives the United

[4] Sureties have unsuccessfully resisted recovery on such bonds on a variety of other grounds, such as that recovery of the tax was barred by limitations (*Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *John Barth Co.*, 279 U. S. 370); lack of consideration (*United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322 (C. C. A. 2d)); that the bonds was not authorized by statute (*Maryland Casualty Co.* v. *United States*, 87 F. (2d) 646 (C. C. A. 7th)); *United States* v. *Wolper*, 86 F. (2d) 715 (C. C. A. 2d)); *United States* v. *Fidelity & Deposit Co. of Maryland*, 80 F. (2d) 24 (C. C. A. 9th), certiorari denied, 298 U. S. 665; *United States* v. *Clark*, 3 F. Supp. 375 (W. D. Pa.); *United States* v. *Converse Cooperage Co.*, 42 F. (2d) 227 (N. D. Ill.)); that

States a "cause of action separate and distinct from an action to collect taxes which it already had". *United States* v. *John Barth Co.*, 279 U. S. 370, 375; *United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322, 325 (C. C. A. 2d); *Hilton Lumber Co.* v. *Grissom*, 70 F. (2d) 892, 894 (C. C. A. 4th), certiorari denied, 293 U. S. 613; *United States* v. *Jureidini*, 35 F. (2d) 57 (S. D. N. Y.).

Clearly, the Collector had no express authority to release the Government's claim on the bond, and, we submit, no such authority is implied in view of the complete control of the Commissioner over abatement claims and the settled policy to require security with all cases which rendered the collectors' functions in actual practice substantially ministerial.

Moreover, the reasons of public policy for the rule that the Government is not bound by unauthorized acts of its agents requires that such authority in a subordinate official to surrender rights of the United States be clearly expressed in statute or regulation and forbids that it rest solely upon implication.

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the tax in question was not due (*Maryland Casualty Co.* v. *United States*, 87 F. (2d) 646 (C. C. A. 7th)); and that the abatement claim was never filed, or was filed too late (*Hughson* v. *United States*, 59 F. (2d) 17 (C. C. A. 9th); *Roberts Sash & Door Co.* v. *United States*, 38 F. (2d) 716 (C. Cls.), affirmed, 282 U. S. 812; *United States* v. *Massachusetts Bonding & Ins. Co.*, 60 F. (2d) 541 (S. D. N. Y.)). See generally annotation on bonds for payment of income tax. 117 A. L. R. 452.

The rule that the Government is not bound by the unauthorized acts of its agents is not a technical rule of tax law, but has been declared to be a basic principle inherent in the structure of our Government in which all authority to bind the Government must be found in its constitutional or statutory enactments. *The Floyd Acceptances*, 7 Wall. 666, 676–677. This principle is supported by the public policy which places occasional loss on an individual who relies on such unauthorized acts rather than upon the public at large represented by the Government. A different rule might encourage such unauthorized acts and might encourage reliance upon such acts from which the public could not easily protect itself. *Lee* v. *Munroe*, 7 Cranch 366, 369; cf. Story, Agency, Section 307 (a) (9th Ed.). This rule has been applied consistently, *Whiteside* v. *United States*, 93 U. S. 247, 256–257; *Hart* v. *United States*, 95 U. S. 316, 318 (action against surety on distiller's bond to recover loss caused by collector); *Hawkins* v. *United States*, 96 U. S. 689, 691; *Minturn* v. *United States*, 106 U. S. 437, 445 (action on surety bond to recover loss caused by collector); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Jeems Bayou Club* v. *United States*, 260 U. S. 561, 564; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123–124.

Under the accepted liberal rules of constitutional construction (*McCulloch* v. *Maryland*, 4 Wheat.

316, 407), a broad doctrine of implied authority might properly be applied to superior officers of the Government deriving their powers from necessarily general provisions found in the fundamental law. *The Floyd Acceptances,* 7 Wall. 666, 677. Such doctrine, however, should not be applied to subordinate Government officials with powers and duties prescribed and limited by specific laws. Their authority must be found in a statute either expressly or by inescapable implication, which is not present here. Certainly this is true where the implied authority claimed is to release a claim of the Government. And it seems clear that the effect of the petitioner's argument is that the Collector had authority to release or compromise the claim of the Government.

When the surety paid the Collector $8,223.67, there was also due on the bond $4,169.07. By the express terms of the bond the surety was obliged to pay tax and interest and, although it disputed the tax liability (R. 9), it had no standing to do so. *United States* v. *John Barth Co.,* 279 U. S. 370; *Bowers* v. *American Surety Co.,* 30 F. (2d) 244 (C. C. A. 2d), certiorari denied, 279 U. S. 865. The exact circumstances under which the surety paid only $8,223.67 by the draft dated December 17, 1926, to the order of the Collector "in full settlement of all liability" on the bond (R. 10C), are not known, but the most probable construction of the draft is that it was submitted in compromise. Immediately after the draft was paid, the Collector,

in his letter of December 20, 1926, returned the bond and stated all liability under it was terminated, but it had been the clear rule for years, and the surety must have known, that only the Commissioner, with the consent of the Secretary of the Treasury, and not the Collector, was authorized to make a compromise. Treasury Regulations 45, Article 1011 (1918 Revenue Act); *Botany Mills* v. *United States*, 278 U. S. 282, 288–289; *Leach* v. *Nichols*, 23 F. (2d) 275, 277 (C. C. A. 1st). The surety must have known, therefore, that it could not rely on the Collector's statement or upon return of the bond to extinguish the Government's rights. The law had long been settled that every surety is presumed to know that the Government is not bound by unauthorized acts of its agents. *Hart* v. *United States*, 95 U. S. 316, 318.

If the Collector was not authorized by law to release the rights of the United States on the bond, as the Government has contended, the United States is not bound by his unauthorized acts and the court below properly allowed recovery on the bond. *United States* v. *Globe Indemnity Co.*, 94 F. (2d) 576 (C. C. A. 2d), certiorari denied, 304 U. S. 575; *Elliot* v. *District of Columbia*, 10 D. C. 396; *People* v. *Brown*, 67 Ill. 435; cf. *Hart* v. *United States*, 95 U. S. 316, 318; *Ritter* v. *United States*, 28 F. (2d) 265 (C. C. A. 3d); *United States* v. *Roanoke Motor Co.*, 8 F. Supp. 228 (W. D. Va.).

The petitioner relies on *United States* v. *Alexander*, 110 U. S. 325; *Heinemann Chemical Co.* v.

United States, 92 F. (2d) 302 (C. C. A. 3d); *Brewerton* v. *United States,* 9 F. Supp. 503 (C. Cls.). In the *Alexander* case, *supra,* the Secretary of the Treasury abated internal revenue taxes on liquor destroyed by fire in a bonded warehouse, and the surety on the warehouse bond was so notified pursuant to statutory authority (c. 218, 17 Stat. 162), which provided that the Secretary might abate the taxes and expressly provided that he might cancel any warehouse bond. Thereafter the Secretary attempted to withdraw the abatement and suit was brought on the bond. The court held that there had been a cancellation of the bond under the statute which could not be construed to give him the unlimited power to withdraw the assessment and subject the principals and sureties to a new liability. The court stated that the tax must be reassessed and a new bond obtained. This case of attempted unauthorized revival of an obligation released by exercise of express statutory authority is, of course, different from the present situation. Indeed, it is authority for the Government's position insofar as it states the strict rule that acts of Government officers, to be effective, must be based on clear statutory authority.

In the *Heinemann* case, *supra,* upon denial of a statutory abatement claim filed under Section 214 (a) (12) (a) of the 1918 Act, the taxpayer paid the tax for 1918 without interest and the Collector accepted a bond for $10,000, which he thought

sufficient to secure the interest, in substitution for the original abatement bond of $46,350. The Circuit Court of Appeals for the Third Circuit, relying on the *Alexander* and *Brewerton* cases, *supra,* held that the Collector was authorized to release the first bond, reversed the judgment for the Government on the first bond (15 F. Supp. 365 [W. D. Pa.]), and granted a new trial.[5]

To the extent that the *Heinemann* case presents a view substantially opposed to the view of the court below, it is submitted that the view of the Circuit Court of Appeals for the Third Circuit at that time mistakenly applies the Alexander decision, and the only other decision it cites, *Brewerton* v. *United States, supra,* also mistakenly applies the *Alexander* decision.[6]

It is submitted, therefore, that the Collector was authorized to release the surety's obligation to the United States only if such authority can be found in the statutes and regulations defining his powers and duties; that nothing in the provisions regulating abatement claims and bonds given therewith, or in the general statutory provisions in respect

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[5] The record before the court had left unsettled the question of fact whether the Commissioner had instructed the Collector not to release the first bond until further instructions.

[6] In the *Brewerton* case the taxpayer sued to recover a tax paid after the statute of limitations had run and the Government's affirmative defense that the amount sued for was due to the Government on the abatement bond was rejected on the ground that the Collector released the bond.

of collectors, expresses such authority or fairly implies it; that, therefore, the Collector's acts were unauthorized; that the surety must have known, and is deemed to have known, this when it paid part of the sum demanded and obtained the physical return of its bond; and that in such a case the law is clear that the United States is not bound by the Collector's unauthorized acts in declaring that no further liability existed either for the tax or on the bond, and upon that basis returning the bond.

Finally, the proper remedy for lack of express authority to release these surety bonds given for protection of the Government, if any remedy is needed now after elimination of the general abatement claim procedure, is legislation either conferring such authority expressly on chosen officials or providing a period of limitations for suits on such bonds. It is submitted that the proper remedy is not a judicial determination that subordinate officials such as collectors have such authority even in the absence of any regulations of their superiors controlling its exercise.

II

INTEREST OF 6% PER ANNUM IS DUE ON $4,169.07 FROM DECEMBER 17, 1926, THE DATE OF PAYMENT OF $8,223.67

Interest on the additional tax of $8,223.67 has been computed without disagreement to be $4,169.07 up to December 17, 1926, when the surety paid an amount equal to the additional tax but

refused to pay a further sum equivalent to the interest.[7]

The District Court held that as a matter of law the Government was not entitled to interest on the interest item of $4,169.07 in the absence of agreement or statute and, moreover, that as a matter of equity, interest would be inequitable in view of the Collector's statement that there was no liability on the bond and in view of the delay in commencing this action. (R. 13.) The Circuit Court of Appeals reversed the District Court upon this point, holding that the Government's claim was not one for interest upon interest, but a claim for breach of contract which normally carries interest. The court below further held that in the circumstances of the present case it was not inequitable to charge the surety with interest. (R. 19.) We submit that this holding of the court below is correct.

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[7] If the payment of $8,223.67 was not made in compromise of the entire claim it might have been applied, following usual commercial practice, first to the interest of $4,169.07 which was due, leaving $4,054.60 ($8,223.67 minus $4,169.07) of the principal of the tax unpaid and mandatory statutory interest under the revenue acts (12% part of the time) would have continued to accrue up to the present time. But the practice of the Bureau, contrary to commercial practice, is to apply payments first to the tax, and this case has proceeded on the theory that this was done and that interest was left unpaid. This fact, that the Government might have pursued the other alternative and might have demanded more interest at the tax rate than is now demanded, is pertinent to a discussion of the question whether the interest demanded is equitable.

A. THE LAW REQUIRES INTEREST

The surety in its bond expressly undertook to pay any additional tax with interest. (R. 10B.) If it had paid neither the tax nor interest, it is clear that it would have been liable at least for the taxes and statutory interest provided by the revenue acts up to the penal sum of the bond, and for a further sum of interest even beyond the penal sum of the bond at the ordinary legal rate for any additional period of its failure to pay after demand. *Massachusetts Bonding & Ins. Co.* v. *United States,* 97 F. (2d) 879 (C. C. A. 9th); *United States* v. *Wagner,* 93 F. (2d) 77 (C. C. A. 9th); *United States* v. *Rigali,* 90 F. (2d) 929 (C. C. A. 9th); *United States* v. *Hamilton,* 96 F. (2d) 878 (C. C. A. 7th); *Maryland Casualty Co.* v. *United States,* 87 F. (2d) 646 (C. C. A. 7th); *Maryland Casualty Co.* v. *United States,* 76 F. (2d) 626 (C. C. A. 5th); see *United States* v. *United States Fidelity & Guaranty Co.,* 236 U. S. 512, 528. The applicable legal rate is 6% per annum (New York General Business Law, Section 370).

When the surety in effect refused to pay the amount of $4,169.07 on December 17, 1926, it clearly violated an express condition of its bond and became liable to pay that amount not as interest on the tax but as an equivalent contractual amount due on its bond. Liability for interest on that amount is implied by the nature of the surety's promise, becomes part of the debt, and is due as a matter of right.

If the United States was suing the taxpayer directly for interest on the cause of action for taxes, and was not suing the surety on the separate contractual obligation of the bond, the question of interest on interest would arise. But it is settled that the abatement bond gives the United States "a cause of action separate and distinct from an action to collect taxes", so that even if the tax action is barred completely, recovery may be had on the bond. *United States* v. *John Barth Co.*, 279 U. S. 370, 375; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32, 44. If complete extinguishment of the entire tax cause of action does not affect the action on the bond then, *a fortiori*, the fact that the incidental or supplementary right of interest on interest might be denied in a suit on the tax cause of action does not permit the denial of legal interest on the amount recoverable on the bond which is not interest, but a sum in lieu of interest which the surety has contracted to pay. The courts, applying the *Barth* decision, *supra*, have allowed interest at the legal rate upon these abatement bonds against sureties, under the settled rule that sureties are liable for such interest after they fail to pay upon demand. *Massachusetts Bonding & Ins. Co.* v. *United States, supra; United States* v. *Hamilton, supra.* Consequently, under the same rule, interest at the legal rate is due.

The rule stated by the District Court (R. 13) has no application because, as has been stated, this is

not a case of interest on interest, but interest on a sum due under the separate obligation of the bond. Moreover, the rule of no interest upon interest is applied, when it is applied, in connection with the rule that a partial payment is applied first to interest and then to principal with interest continuing to accrue on the amount unpaid until final payment. *Story* v. *Livingston,* 13 Pet. 359; *Young* v. *Hill,* 67 N. Y. 162, 167; *State of Connecticut* v. *Jackson,* 1 Johns. Ch. 13 (N. Y.). That rule has no application here where the surety's partial payment was applied not to interest but to principal. No interest would accrue at all on the amount remaining unpaid after applying a partial payment to principal unless interest be allowed on this unpaid sum which is now due on the bond in lieu of interest on the tax due from the taxpayer. The purpose of the bond is to give the Government the equivalent of the tax and all interest and this purpose can be achieved only by approving the allowance of interest made by the court below.

B. IN THE CIRCUMSTANCES INTEREST IS NOT INEQUITABLE

The District Court stated that interest would be inequitable in view of the Collector's action in returning the bond and the delay in the institution of this action, citing *Board of Comm'rs* v. *United States,* 308 U. S. 343, 350, 352. (R. 13.) It is true that when, as in that case, the federal court is engaged for the first time in determining which rule of interest shall be adopted, as the new

federal rule, general notions of equity will be considered in fashioning the applicable rule. But when the applicable legal rule is formulated and fixed, and it is not denied that 6% interest is due unless barred on the equitable ground of laches, it is submitted that equitable considerations of a particular case should not determine the allowance of legal interest.

Moreover, even if the courts were disposed to grant or withhold legal interest for breach of a contract according to their notions of the particular equities, it is submitted that legal interest is not inequitable in this case. The surety had no right to contest the tax and it clearly breached its bond when it offered to pay and paid less than the tax and the tax interest. *United States* v. *John Barth Co., supra.* It must have known, and is deemed to have known, that the Collector was not empowered to accept this payment in compromise. It is charged with knowledge that the Collector was not authorized to relinquish the Government's rights on the surety's bond. There is no showing upon the present record when the superior officers of the Government were informed of the petitioner's failure to comply with the demand made upon it on August 5, 1926, to fulfill its obligation under the bond. During the entire period from the original demand the petitioner has had the use of the money in respect of which it had no proper basis to believe it was not under the duty to pay to the Government.

Decisions relied on by the petitioner (Br. 24), such as *United States* v. *Sanborn*, 135 U. S. 271, 281, denying the Government interest, not claimed pursuant to contract, on the equitable ground of laches of the Government's agents, are based on facts wholly different from the circumstances here and involving different equitable considerations. If interest is not due here contractually as a matter of right, as the Government contends, but is to be decided on the equities, it is submitted that the facts disclose that the equities favor the Government.

Moreover, even if interest be not allowed from December 17, 1926, it should be allowed from September 23, 1932, when the Collector demanded that the surety pay the amount still due (R. 10).

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.
EDWARD J. ENNIS,
Assistant United States Attorney,
Southern District of New York.

APPENDIX

Revised Statutes:

SEC. 321. The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; * * *. (U. S. C., Title 26, Secs. 1691, 1701.)

SEC. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. Whenever it is ascertained that any list which has been or shall be delivered to any collector, is imperfect or incomplete in consequence of the omission of the name of any person liable to tax, or in consequence of any omission, or understatement, or undervaluation, or false or fraud-

ulent statement contained in any return made by any person liable to tax, the Commissioner of Internal Revenue may, at any time within fifteen months from the time of the delivery of the list to the collector as aforesaid, enter on any monthly or special list the name of such person so omitted, together with the amount of tax for which he may have been or shall become liable, and also the name of any such person in respect to whose return, as aforesaid, there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amount for which such person may be liable, above the amount for which he may have been or shall be assessed upon any return made as aforesaid; and he shall certify and return such list to the collector as required by law. And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed. (U. S. C., Title 26, Secs. 1530, 1531, 1532, 1533.)

SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. And every collector and deputy collector shall give receipts for all sums collected by him. (U. S. C., Title 26, Secs. 1541, 1549.)

SEC. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought

upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit. (U. S. C., Title 26, Secs. 1640, 1645.)

SEC. 3220 (as amended by Section 1316 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057). The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Sec. 1670.)

SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced.

> Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise. (U. S. C., Title 26, Sec. 1661.)

Treasury Regulations 45 (1920 Ed.) provide:

> ART. 1032. *Claims for abatement of taxes erroneously assessed.*—Claims by the taxpayer for the abatement of taxes or penalties erroneously or illegally assessed or abatable under remedial acts shall be made on form 47 (revised). They must be sustained by the affidavits of the parties against whom the taxes were assessed, or of other parties cognizant of the facts. When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting the presumption and showing that it was improperly or illegally assessed, or that relief should be given under a remedial statute, rests upon the applicant for abatement. The affidavits must therefore contain full and explicit statements of all the material facts relating to the claim in support of which they are offered and to the proper consideration of which they are essential. The legality of the claim is to be determined by the Commissioner upon the facts presented by the affidavits. The filing of a claim for abatement does

not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. See further Regulations No. 14 (revised). A collector may himself present once a month a blanket claim on form 47 (revised) for the abatement of taxes coming within certain classes of taxes erroneously assessed.

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SUPREME COURT OF THE UNITED STATES.

No. 817.—October Term, 1940.

The Royal Indemnity Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

A collector of internal revenue, who had accepted a surety bond filed with him by a taxpayer to accompany his claim for abatement of income tax, consented to termination of all liability upon the bond and surrendered it before its obligation was fully satisfied. The questions for decision are whether the collector had power to release the obligation of the bond and, if not, whether the United States is entitled to interest on the amount of its claim against the surety.

Upon the Commissioner's assessment in 1920 of additional income taxes in the sum of $29,128, asserted to be due from the taxpayer for 1917, the taxpayer filed a claim for abatement of the assessment, and to secure suspension of collection of the tax, executed a bond to the collector in the sum of $38,000 with petitioner as surety, conditioned upon payment on May 2, 1923, of the tax with interest. The Commissioner allowed the claim in abatement in part but rejected it to the extent of $8,223.38, on which interest had then accrued in the sum of $4,169.07. On demand of the Commissioner on August 5, 1926, for the principal amount of the tax with interest to the date of demand, petitioner paid only the principal amount of the tax to the collector by draft of December 17, 1926, bearing the notation on its face that it was in full payment of the tax and of all liability on the bond. The collector collected the draft and surrendered the bond to petitioner with the statement that all liability on it had terminated.

In the present suit on the bond the District Court held that the collector was without authority to release the bond and gave judgment for the sum of $4,169.07 found by the Commissioner to be the interest on the unpaid tax to the date of the rejection of the

claim for its abatement, but refused to allow interest accruing subsequent to that date. On appeal the Circuit Court of Appeals ruled that under § 370 of the New York General Business Law, interest at six per cent. should be added to the unpaid balance found to be due on the bond and modified the judgment accordingly. 116 F. (2d) 247. We granted certiorari April 7, 1941, because of the importance of the questions presented, and of a conflict of the decision below with that of the Circuit Court of Appeals for the Third Circuit in *Heinemann Chemical Co.* v. *United States,* 92 F. (2d) 302.

It is not denied that the collector had authority to accept the bond, that it created a new cause of action distinct from that on the taxpayer's obligation, and that if it has not been released, the United States has authority to sue upon it, see *United States* v. *John Barth Co.,* 279 U. S. 370; *Gulf States Steel Co.* v. *United States,* 287 U. S. 32; *United States* v. *Wolper,* 86 F. (2d) 715; *United States* v. *Oswego Falls Corp.,* 113 F. (2d) 322. And it is conceded that, as the bond was conditioned on the payment of the taxes with interest, petitioner is indebted to the Government upon it for the amount of the interest which had accrued at the time of the rejection of the claim in abatement. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282; *Hughson* v. *United States,* 59 F. (2d) 17, 19; *United States* v. *Steinberg,* 100 F. (2d) 124, 126. Respondent's contentions are that the balance of interest then due was released by the collector and that in any case it was not bound to pay interest on that balance.

Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. *Whiteside* v. *United States,* 93 U. S. 247, 256-257; *Hart* v. *United States,* 95 U. S. 316, 318; *Hawkins* v. *United States,* 96 U. S. 689, 691; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123-124; cf. *United States* v. *Shaw,* 309 U. S. 495, 501; *Ritter* v. *United States,* 28 F. (2d) 265; *United States* v. *Globe Indemnity Co.,* 94 F. (2d) 576. Collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting the taxes. R. S. § 3183, *Erskine* v. *Hohnbach,* 14 Wall. 613, 616; *Hardy* v. *Woodcock,* 137 U. S. 43, 46; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373,

380, 381. There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. R. S. §§ 3220, 3229, 26 U. S. C. 1661; 45 T. R., Art. 1011 (1918 Act); *Botany Worsted Mills* v. *United States, supra,* 288; *Loewy & Sons* v. *Commissioner,* 31 F. (2d) 652, 654.

There is thus no basis in the statutes of the United States for implying an authority in a collector to release a bond for the payment of the tax which the Commissioner alone is permitted to reduce by way of compromise when the Secretary of the Treasury consents. *Heinemann Chemical Co.* v. *United States, supra,* and *Brewerton* v. *United States,* 9 F. Supp. 503, to the contrary, plainly rest upon a misapplication of the ruling in *United States* v. *Alexander,* 110 U. S. 325, which sustained the release of a bond for taxes by the Secretary of the Treasury which had been specifically authorized by an Act of Congress.

The District Court rejected the Government's claim for interest upon the balance found due upon the bond as a demand for interest on interest which has generally been held not to be an appropriate measure of damages for the delayed payment of interest alone. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. In any case it thought that the allowance of interest would be inequitable because of the collector's return of the bond to petitioner and the Government's delay in bringing the suit. But, as the Court of Appeals held, the obligation of petitioner to pay the interest accrued on the principal amount of tax under the applicable provisions of the Revenue Act was not damage assessed against petitioner for its non-payment of interest. Petitioner's obligation was contractual to pay an amount found to be due from the taxpayer and the suit against it is for a debt *ex contractu,* due and owing in conformity to the terms of the bond. See *United States* v. *John Barth Co., supra; Gulf States Steel Co.* v. *United States, supra.*

A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date. And in the absence of any controlling statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage. *United States* v. *United States Fidelity*

Co., 236 U. S. 512, 528; *Young* v. *Godbe*, 15 Wall. 562, 565; *Maryland Casualty Co.* v. *United States*, 76 F. (2d) 626; *United States* v. *Wagner*, 93 F. (2d) 77; *United States* v. *Hamilton*, 96 F. (2d) 878; *Massachusetts Bonding & Ins. Co.* v. *United States*, 97 F. (2d) 879, 881.

But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. *Board of Commissioners, Jackson County* v. *United States*, 308 U. S. 343, 350, 352; *Young* v. *Godbe, supra*, 565; cf. *Billings* v. *United States*, 232 U. S. 261, 284, *et seq.*

The present suit is at law for the recovery of an amount due and owing which petitioner has contracted to pay. To such a case equitable rules relating to interest recoverable in suits for an accounting, or for the recovery of quasi contractual obligations arising from payment of money by mistake, are inapplicable. *United States* v. *United States Fidelity Co., supra*, 528; cf. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176; *United States* v. *Sanborn*, 135 U. S. 271, 281; *Redfield* v. *Bartels*, 139 U. S. 694, 702. Here responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. *United States* v. *United States Fidelity Co., supra*, 528; *Massachusetts Bonding & Insurance Co., supra*; *United States* v. *Wagner, supra*; *Maryland Casualty Co.* v. *United States, supra*. While the New York statute fixing the rate of interest is not controlling, the allowance of interest does not conflict with any state or federal policy and we think that in the circumstances of this case a suitable rate is that prevailing in the state where the obligation was given and to be performed. See *Young* v. *Godbe, supra*, 565; *Board of Commissioners, Jackson County* v. *United States, supra*, 352.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 817.—October Term, 1940.

The Royal Indemnity Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Black, dissenting.

I agree with the Court's judgment that the Collector of Internal Revenue did not have power to release a taxpayer from his obligation to pay, but I am unable to agree with the Court's conclusions on the question of interest. The contract on which the Government's suit rests contained no provision for interest. The state's interest law, according to the holding of the Court, is not controlling. Congress has enacted no law requiring payment of interest and fixing an interest rate on contracts guaranteeing tax payments. Nevertheless, this Court now requires that interest be paid—a judicial requirement which under similar circumstances has been frankly described as "judicial law-making". *Board of County Commissioners* v. *United States*, 308 U. S. 343, 350.

Were the question an open one, I would be reluctant to acquiesce in holding that federal courts, in the absence of statutes, could or should assume the power to fix interest in such a case. But, granting that we have the power to take this step, the rate of interest to be charged is from necessity an element of the legislative and policy power thus exercised, and that rate must therefore be determined by the Court. The rate fixed in this case is 6%. Resolution as to the amount is rested in part at least on New York's legislative rate. The inference is that a different rate might apply to contracts guaranteeing tax payments made in other states. For it is well known that interest rates fixed by state legislatures are not uniform but vary in amount.

Since in prescribing interest and fixing an interest rate we are passing upon questions of public policy, not marked at all by definite legislative boundaries, I find it difficult to agree to the

result here for two reasons: (1) Unless the rate fixed is to be considered in the nature of a penalty, 6% seems very high. A smaller rate would appear to come nearer to harmonizing with fair and equitable interest exactions. (2) I am of opinion that since our "judicial law-making" is and must be national in its scope, the law which we adopt fixing a rate of interest for transactions such as that here involved should operate with uniformity throughout the nation. Federal taxpayers or their sureties should not be required to pay 6% in one state, 4% in a second, and 10% in a third. Such varying rates are not subject to criticism by federal courts if they govern local intrastate transactions subject to state law. But it seems to me that federal taxpayers and their sureties should be subject to the same interest rate without regard to the state rates governing purely local transactions within a particular area in which federal taxpayers happen to reside. To the extent that the Court's opinion indicates the possibility of such a variance among the states, I am compelled to disagree.

Mr. Justice DOUGLAS and Mr. Justice MURPHY concur in this opinion.

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